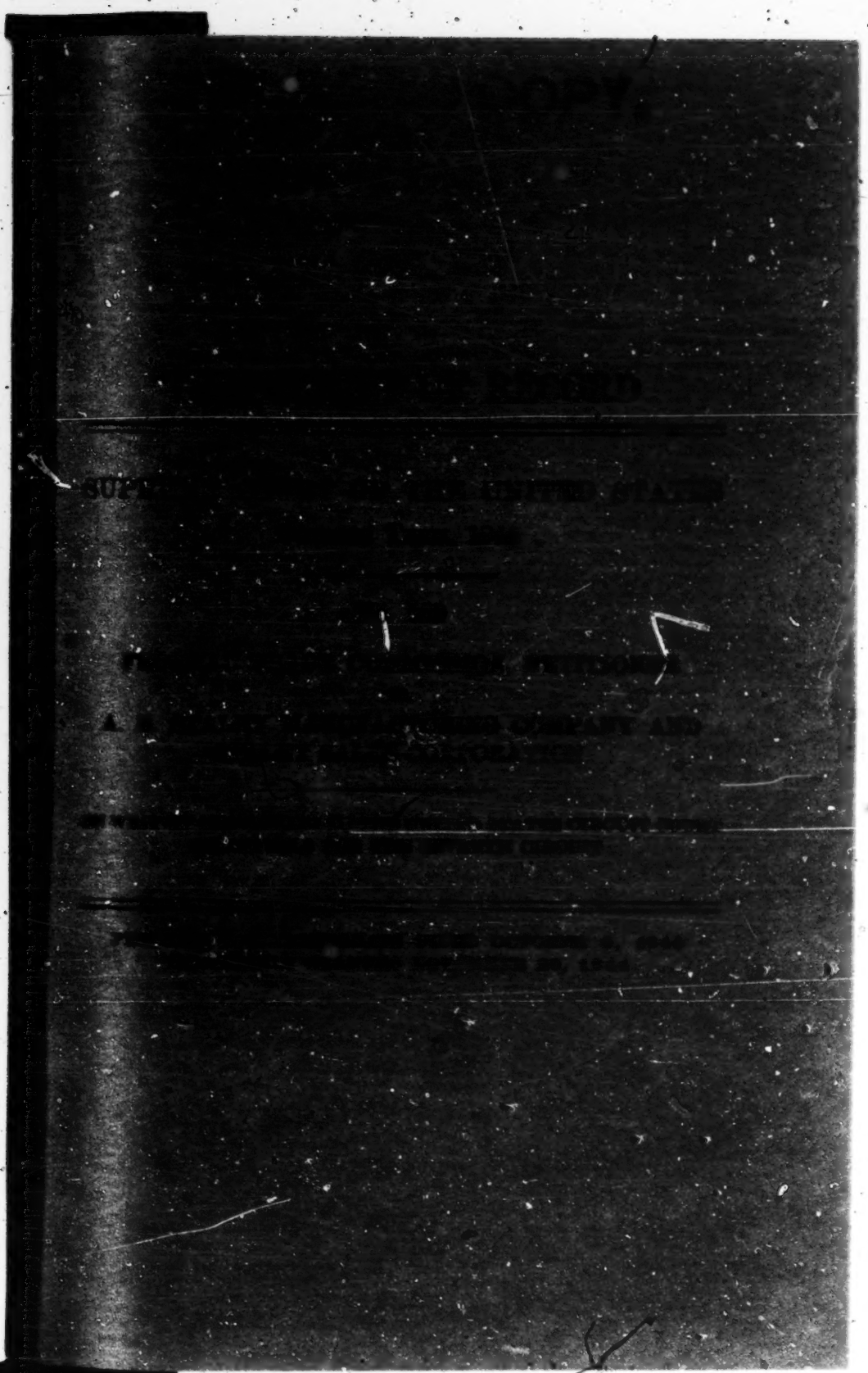

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 559

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

621048—44——1

1

Before Federal Trade Commission

Docket No. 3803

IN THE MATTER OF A. E. STALEY MANUFACTURING COMPANY, THE STALEY SALES CORPORATION, RESPONDENTS

Complaint

Filed June 1, 1939

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 9, 1936, have violated and are now violating the provisions of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One. Respondent, A. E. Staley Manufacturing Company, is a corporation organized and existing under the laws of Delaware with its principal office and place of business at 2200 East Eldorado Street in the city of Decatur and State of Illinois. Respondent The Staley Sales Corporation is a corporation organized under the laws of the state of Illinois and has its principal office and place of business at 2200 East Eldorado Street, city of Decatur and state of Illinois. Respondent, The Staley Sales Corporation, is a wholly owned sales subsidiary of respondent A. E. Staley Manufacturing Company, through which products manufactured by A. E. Staley Manufacturing Company are sold and distributed. A. E. Staley Manufacturing Company owns the entire capital stock of The Staley Sales Corporation and controls and directs The Staley Sales Corporation.

Paragraph Two. Respondent, A. E. Staley Manufacturing Company, owns and operates a plant at Decatur, Illinois. This plant has a corn grinding capacity in excess of 50,000 bushels per day, with complete facilities for the finished fabrication of all known corn products, both for household and industrial use.

2 Paragraph Three. For many years respondents have been and are now engaged in the business of manufacturing, selling and distributing in interstate commerce products derived from corn. The principal products derived from corn are (1) Starch, both for food and other purposes; (2) Glucose or Corn Syrup; and (3) Corn sugar. Starch is first manufactured from the corn, and glucose and grape sugar are made by treating the starch with certain acids, the resulting solid

product being sugar and the resulting syrup being glucose. Glucose is largely used in the manufacture of candy, jellies, jams, preserves, and the like as well as in the mixing of syrups.

The principal byproducts of corn resulting in the corn products business are gluten feed, corn oil, corn oil cake and corn oil meal.

A. E. Staley Manufacturing Company, in addition to bulk products, produces branded products.

Paragraph Four. For many years in the course and conduct of their business, the respondents have been and are now manufacturing the aforesaid commodities at the aforesaid plant and have sold and shipped and do now sell and ship such commodities in commerce between and among the various states of the United States from the state in which their factory is located across state lines to purchasers thereof located in states other than the state in which respondents' said plant is located in competition with other persons, firms and corporations engaged in similar lines of commerce.

Paragraph Five. Since June 19, 1936, and while engaged as aforesaid in commerce among the several states of the United States and the District of Columbia, the respondents have been and are now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, which commodities are sold for use, consumption or resale within the several states of the United States and the District of Columbia in that the respondents have been and are now selling such commodities to some purchasers at a higher price than the prices at which commodities of like grade and quality are sold by respondents to other purchasers generally competitively engaged with the first mentioned purchasers.

Paragraph Six. The effect of said discriminations in price made by said respondents, as set forth in Paragraph Five herein, may be substantially to lessen competition in the sale and distribution of corn products between the said respondents and their competitors; tend to create a monopoly in the line of commerce in which the respondents are engaged; and to injure, destroy, and prevent competition in the sale and distribution of corn products between the said respondents and their competitors.

Paragraph Seven. The effect of said discriminations in price made by said respondents, as set forth in Paragraph Five herein, may be substantially to lessen competition between the buyers of said corn products from respondents receiving said lower discriminatory prices and other buyers from respondents competitively engaged with such favored buyers who do not receive such favorable prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, de-

stroy, and prevent competition in the lines of commerce in which those who purchase from respondents are engaged between the said beneficiaries of said discriminatory prices and said buyers who do not and have not received such beneficial prices.

Paragraph Eight. The aforesaid acts of respondents constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, sec. 13).

Wherefore, the premises considered, the Federal Trade Commission on this 1st day of June A. D. 1939, now issues this its complaint against A. E. Staley Manufacturing Company and The Staley Sales Corporation, stating its charges as hereinabove set out.

Notice

Notice is hereby given you, A. E. Staley Manufacturing Company and The Staley Sales Corporation, respondents herein, that the 7th day of July A. D. 1939, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with
4 the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearings on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true, and if in the judgment of the Commission such facts admitted constitute a violation of law or laws as charged in the complaint, to make and serve findings as to the facts and an order to cease and desist from such violations. Upon application in writing made contemporaneously with the filing of such answer, the respondent, in the discretion of the Commission, may be heard on brief, in oral argument, or both, solely on the question as to whether the facts so admitted constitute the violation or violations of law charged in the complaint.

In witness whereof, the Federal Trade Commission has caused this, its complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 1st day of June A. D. 1939.

By the Commission.

[SEAL] OTIS B. JOHNSON, *Secretary.*

5 Before Federal Trade Commission

[Caption—3803]

Answer of respondents to complaint

Filed June 22, 1939

Comes now the Respondents herein, the A. E. Staley Manufacturing Company (a corporation) and the Staley Sales Corporation (a corporation), without herein waiving the benefit and advantage to the Respondents or either of them under the motion herein filed to dismiss said complaint, and for answer to the complaint herein and to each paragraph thereof Respondents jointly and severally state:

Paragraph One. The Respondents and each of them deny each and every material allegation contained in the complaint filed herein and each paragraph thereof separately except as in this answer set out.

Paragraph Two. The Respondents admit that the A. E. Staley Manufacturing Company is a corporation organized and existing under the laws of the State of Delaware; that the Staley Sales Corporation is a corporation organized and existing under the

laws of the State of Illinois; that each of said corporations have their principal office and place of business at number 2200 East Eldorado Street in the City of Decatur in the County of Macon and State of Illinois; that the majority of the stock in the Staley Sales Corporation is owned by the A. E. Staley Manufacturing Company; that the said Staley Sales Corporation, under contract by it had with the A. E. Staley Manufacturing Company, does sell and distribute certain of the products manufactured by the A. E. Staley Manufacturing Company in some several of the States in the United States of America; that said Staley Sales Corporation does not engage in the sale or distribution of corn products in any state or county foreign to the United States of America. Respondents aver that the Staley Sales Corporation and the A. E. Staley Manufacturing Company are separate and distinct entities, each having a separate and distinct Board of Directors with their respective officers for the operation
6 and discharge of the several corporate powers to them given under the respective charters to them given by said Sovereign States.

That the A. E. Staley Manufacturing Company does own and operate a manufacturing plant at Decatur, Illinois. It denies, however, that said plant has a corn grinding capacity in excess of 50,000 bushels of corn per day and that said plant has complete facilities for the finished fabrication of all known corn products both for household and industrial uses. Respondent A. E. Staley Manufacturing Company avers trat its products consist in the main of the following: various types of starches, unmixed corn syrups, crude corn sugars, table syrups, packaged starches, gluten feed, germ meal, crude and refined corn oil.

Paragraph Three. It is admitted that for many years the A. E. Staley Manufacturing Company has been and is now engaged in the business of manufacturing, selling, and distributing in Interstate Commerce certain of its products derived from corn, but Respondents deny that the Staley Sales Corporation is engaged in the business of manufacturing, producing, or processing corn products of any kind. It is admitted that the principal products derived by the A. E. Staley Manufacturing Company from corn consist of: (1) starch both for food and other purposes; (2) glucose or corn syrup, and (3) corn sugar. The A. E. Staley Manufacturing Company, Respondent herein, respectfully answering said complaint, says that the starch hereinbefore described is manufactured from corn and that numerous and divers products including corn syrup, grape sugar, and various other corn products are produced by numerous and divers processes following certain formulas and in part by secret processes devised, owned, employed, and used by said Staley Manufacturing Company.

Respondents admit that glucose is used in the manufacture of candies, jellies, jams, preserves, and the like, as well as for the mixing of syrups, but its uses are not confined to those hereinbefore specified but extend to many and divers other uses and purposes to meet the demand of the general public desiring to use glucose. The A. E. Staley Manufacturing Company further answering, respectfully says that certain of the byproducts of corn result in the production of gluten feed, corn oil, corn oil cake, and corn oil meal, but that the term "byproducts" as em-

7 ployed in Paragraph Three of said complaint is vague and indefinite and that in truth and in fact under trade usage by a large number of persons "byproducts" is a misnomer for the reason that the entire corn products of the plant of all kinds constitute products of the plant without distinction as to "byproducts." Respondents further answering said Paragraph Three of said complaint state that the A. E. Staley Manufacturing Company does have numerous and divers trade-marks, brands, and the like which are used to designate to the consuming public the manufacturer and the contents of various of its packages, boxes, crates, barrels, cartons and of the various products of said plant including bulk products.

Paragraph Four. That as to Paragraph Four in said complaint the Respondents respectfully direct attention to the allegations therein contained as being wholly general and stating a conclusion. That there is no designation, indication, or information as to any sale, shipment, or distribution in which Respondents have engaged as to the time of any such sale or shipment or to what point or points the same were consigned, by which Respondents can ascertain the nature and character of the transmission as to whether or not interstate commerce is involved.

Paragraph Five. The Respondent, A. E. Staley Manufacturing Company, admits that it has for years, in the course and conduct of its business as hereinbefore alleged and set forth, engaged in manufacturing said commodities hereinbefore named. Both Respondents admit that they have sold and shipped and do sell and ship such commodities in and through certain of the various States of the United States from the State in which said factory is located to purchasers in other than the State in which said plant is located and that Respondents' products are in competition with other persons, firms, and corporations engaged in a similar line of commerce.

Paragraph Six. Respondents respectfully represent that the various allegations set forth in Paragraph Five of said complaint are vague, indefinite, and are so stated that the Respondents are without any information as to the Commerce referred to therein or to the alleged discriminations in the price of its products be-

tween purchasers of said commodities of like grade and quantity. Respondents respectfully represent that they are unable to reply definitely and in detail in relation to the charges made in said Paragraph Five of said complaint without the neces-
8 sary particulars in relation to the alleged and claimed violations as to the dates, persons, and as to the commodities sold. Respondents do, however, expressly deny that they are acting in violation of the said Federal Statute referred to in said complaint, namely, Section 2 of the Clayton Act as amended by the Robinson-Patman Act approved June 14, 1936, and the Respondents severally deny that they are discriminating by selling commodities to some purchasers at a higher price than the price at which commodities of like grades and quality are sold by the Respondents to other purchasers who are generally competitively engaged with the first-mentioned purchasers. Respondents' sales and distributions of products extends throughout the United States and involve sales aggregating approximately seventy-five thousand transactions annually, with varying prices as the same are adjusted from day to day by the market price of the product sold. And if and when any particulars are set forth which disclose the transaction or transactions as to which complaint is made of the violation of the said Federal Act, the Respondents and each of them are ready, willing, and able to set forth specifically and in detail each and every one of the matters in relation to any such allegedly unlawful act.

Paragraph Seven. These Respondents deny that any prices made, fixed, received, and had by them constitute a discrimination in price as alleged in Paragraph Six of said complaint or that the said prices substantially lessen competition in the sale and distribution of corn products between Respondents and their competitors according to the tenor and effect of the said Robinson-Patman Act. Respondents further deny that their transactions or any of them tend to create a monopoly in the line of commerce in which they are engaged or that they injure or tend to injure, destroy or prevent competition in the sale and distribution of corn products between the Respondents and any competitors engaged in the corn grinding industry.

Paragraph Eight. The Resepondents, in answering Paragraph Seven of the complaint herein filed, respectfully direct attention to the charges and allegation therein contained wherein it is in substance stated that the pretended discrimination in price made by the Respondents "May be substantially to lessen com-
9 petition, etc." The Respondents expressly deny the matters and things alleged and set forth in Paragraph Seven of said complaint and respectfully request that there be some designation

and particularity in the terms and provisions of said paragraph so as to enable the Respondents herein to answer said paragraph. Respondents ask that the complaint disclose the nature and character of the transactions referred to and alleged in said Paragraph Seven.

The respondents further say that none of the acts of the Respondents or either of them constitute unfair methods of competition in commerce within the intent and meaning of those sections of the Act of Congress entitled "An Act to Create a Federal Trade Commission, to Define its Powers, and Duties and for other purposes."

Wherefore, these answering Respondents and each of them pray that this action may be dismissed without prejudice or that this cause be set for hearing at as early a date as may be convenient to your Honorable Commission to the end that justice may be done to all parties, and that the Respondents and each of them may be relieved from any ill effects caused by this action and to the end that the complainant shall have full opportunity to go into the courts of the State of Illinois or in any other state having lawful jurisdiction of the parties and subject matter and ask for the redress of any wrongs or deprivation of any rights caused or taken by these Respondents or either of them.

(S) A. E. STALEY MANUFACTURING COMPANY,
(S) STALEY SALES CORPORATION,
Respondents.

Address of Respondents: Decatur, Illinois.
Attorneys for Respondents:
(S) CHARLES C. LEFORGEE,
Decatur, Illinois.

10 BEFORE FEDERAL TRADE COMMISSION

[Caption—3803]

Motion to dismiss complaint, or in the alternative, for particulars

Filed June 22, 1939

And now comes the Respondents, viz, the A. E. Staley Manufacturing Company and the Staley Sales Corporation and jointly and severally enter this motion to dismiss the above complaint in the above entitled cause or in the alternative to particularize the charges made in said complaint. That is to say the complaint is not adequate for the reasons following:

(1) The complaint is wholly vague, uncertain and indefinite in that it fails to specify any wrongful transactions or conduct by the Respondents or either of them as a result of which there was a violation of the Federal Act described in said complaint.

(2). Paragraphs Five, Six, Seven and Eight of the said complaint consist entirely of conclusions and fail to set forth any facts or instances of discrimination upon which Respondents can in conformity with Rule 7 of this Commission file an answer to said complaint containing "a concise statement of the facts which constitute the ground of defense"; and further that said complaint and the charges therein made are so general and uncertain Respondents cannot answer said complaint as required in Rule 7 of this Commission, viz—"specifically admit or deny or explain each of the facts alleged in the complaint unless Respondent is without knowledge in which case respondent shall so state."

(3) The need for greater particularity and specifications of the exact instances of the claimed violations is further necessitated by the fact that the complaint complains of alleged violations from June 19, 1936, to the present. To enable respondents to prepare their answer and defense, it is necessary that the particular transactions or series complained of be made known, as Respondents during this period of time have had in excess of seventy-five thousand tranactions annually and Respondents are not able to
11 ascertain from said complaint which transactions are presented for answer by respondents.

Wherefore, Respondents respectfully move to dismiss the complaint for the foregoing reasons, or in the alternative, that the complaint be made definite and certain in the matters complained of by the alleged complaint filed herein.

Respondents respectfully request the Federal Trade Commission to set a time and place for hearing upon this motion at a time and place convenient to the Commission, with reasonable notice to Respondents as to the time and place for such hearing.

Respectfully submitted.

A. E. STALEY MANUFACTURING COMPANY,
By CHARLES C. LEFORGEE, *Its General Counsel.*
STALEY SALES CORPORATION,
By CHARLES C. LEFORGEE, *Its General Counsel.*

Before Federal Trade Commission

[Caption—3803]

Order denying motion to dismiss complaint or to make complaint more definite and certain

Entered July 6, 1939

This matter coming on to be heard by the Commission upon the motion filed herein on June 22, 1939, by A. E. Staley
12 Manufacturing Company and The Staley Sales Corporation, respondents herein, to dismiss the complaint hereto-

fore issued on June 1, 1939 or to make complaint more definite and certain, and the Commission having duly considered the said motion and the complaint herein, and being now fully advised in the premises;

It is ordered that the motion to dismiss the complaint herein or to make complaint more definite and certain be, and the same hereby is, denied.

By the Commission.

[SEAL] OTIS B. JOHNSON, *Secretary.*

Before Federal Trade Commission

[Caption 3803]

Order appointing trial examiner and fixing time and place for taking testimony

Entered Sept. 12, 1940

This matter being at issue and ready for the taking of testimony, and pursuant to authority vested in the Federal Trade Commission, under Acts of Congress (38 Stat. 717; 15 U. S. C. A., Section 41), and (49 Stat 1526, U. S. C. A., Section 13, as amended),

It is ordered that John L. Horner, a trial examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law;

It is further ordered that the taking of testimony in this proceeding begin on Monday, October 7, 1940, at ten o'clock in
13 the forenoon of that day (central standard time) in Room 1123, New Post Office Building, 433 West Van Buren Street, Chicago, Illinois.

Upon completion of testimony for the Federal Trade Commission, the trial examiner is directed to proceed immediately to take testimony and evidence on behalf of the respondent. The trial examiner will then close the case and make his report upon the evidence.

By the Commission:

[SEAL] OTIS B. JOHNSON, *Secretary.*

[Certificates to following proceedings omitted.]

BEFORE THE FEDERAL TRADE COMMISSION

[Caption—3803]

Statement of Evidence

ROOM 1121, NEW POST OFFICE BLDG.,
CANAL AND VAN BUREN STREETS,
Chicago, Illinois, Monday, October 7th 1940.

Met pursuant to notice at 10:00 o'clock a. m.

Before JOHN L. HORNOR, Trial Examiner.

Appearances: Frank Hier, Esq., and P. R. Layton, Esq., attorneys, appearing on behalf of the Federal Trade Commission.

(No one appearing on behalf of Respondents.)

14 PROCEEDINGS

Trial Examiner HORNOR. This is a convening of hearing in Docket No. 3803, Federal Trade Commission *vs.* A. E. Staley Manufacturing Company, et al. Present Mr. Frank Hier and Mr. P. R. Layton, attorneys for the Federal Trade Commission. Attorney for the Respondents will not appear.

Mr. HIER. Mr. Examiner, attorneys for the Respondents and counsel for the Commission are and have been endeavoring to work out a stipulation of facts which will obviate the necessity of calling a large number of witnesses. This stipulation is still in the process of preparation, and by agreement with counsel for Respondents we ask that this hearing be adjourned until tomorrow morning at ten o'clock at which time we hope to be able to proceed.

Trial Examiner HORNOR. All right, the hearing is now closed and an adjournment is taken to reconvene in Room 1123 New Post Office Building, Chicago, Illinois, on October 8th, 1940 at ten a. m.

(Whereupon, at 10:15 o'clock a. m. the hearing was adjourned until 10:00 o'clock a. m. of Tuesday, October 8th, 1940.)

CERTIFICATE

This is to certify that the attached proceedings before the Federal Trade Commission in the matter of:

Docket No. 3803.
Case Title: A. E. Staley Manufacturing Company.
Place: Chicago, Illinois.
Date: October 8, 1940.

were had as therein appears, and that this is the original transcript thereof for the files of the Commission.

ETHEL E. FISHER & ASSOCIATES, INC.,
Official Reporters.

By F. MACMILLAN,
Assistant Secretary.

15 Before the Federal Trade Commission

[Caption—3803]

ROOM 1123, NEW POST OFFICE BLDG.,
CANAL AND VAN BUREN STREETS,
Chicago, Illinois, Tuesday, October 8th, 1940.

Met pursuant to adjournment at 10:00 o'clock a. m.

Before JOHN L. HORNOR, Trial Examiner.

Appearances: Frank Hier, Esq., and P. R. Layton, Esq., attorneys, appearing on behalf of the Federal Trade Commission. Louis A. Spiess, Esq. (1317 F Street NW., Washington, D. C.), Charles C. La Forgee, Esq., and Carl R. Miller, Esq. (Decatur, Illinois), appearing on behalf of the A. E. Staley Manufacturing Company and The Staley Sales Corporation.

PROCEEDINGS

Trial Examiner HORNOR. This is a reconvening of the hearing in Docket No. 3803, A. E. Staley Manufacturing Company, et al.

Anyone interested in purchasing transcript of the testimony may do so from the official reporter who is not a Government employee.

Mr. HIER. We are ready to proceed, Mr. Examiner.

Trial Examiner HORNOR. Go ahead.

Mr. HIER. Since the adjournment yesterday, counsel for the Commission and counsel for the Respondents have agreed upon a partial stipulation of facts, and I should like to read that in the record at this time.

Trial Examiner HORNOR. Proceed.

Stipulation as to evidence for Commission

Mr. HIER. In order to save the time and expense of extended hearings, the summoning of many witnesses, and the pro-
16 duction of many records, counsel for Respondents and counsel for the Commission now stipulate and agree that witnesses, if called by the Commission, would testify as follows relative to the charges contained in the complaint:

1. That Respondent A. E. Staley Manufacturing Company is a corporation organized and existing under the laws of the State of Delaware; that Respondent Staley Sales Corporation is a corporation organized and existing under the laws of the State of Illinois; and that each of said Respondents has its office and principal place of business on East Eldorado Street, Decatur, Illinois.

2. That Respondent A. E. Staley Manufacturing Company owns all of the capital stock of Respondent Sales Corporation, except the shares held by the directors of Respondent Staley Sales Corporation which are necessary to qualify such directors.

3. That Respondent A. E. Staley Manufacturing Company for many years and at all times since June 19th, 1936, has been engaged in the business of manufacturing products derived from corn, including corn syrup unmixed or glucose, and for that purpose owns and operates a manufacturing and refining plant at Decatur, Illinois, in which such products are produced by grinding and otherwise processing up to approximately 50,000 bushels of corn a day; and that said Respondents respectively have engaged in the business of distributing and selling such syrup to purchasers located in the several states of the United States.

4. That as a result of such sales said products, including such syrup, have been shipped and caused to be transported from said manufacturing plant at Decatur, Illinois, across state lines to such purchasers located in the several states of the United States.

5. That in the course and conduct of their respective businesses as aforesaid, Respondents are competitors of numerous and divers other corporations who sell and ship similar syrup in interstate commerce, including Corn Products Refining Company and Corn Products Sales Company, with plants located at Chicago, Illinois, and Kansas City, Missouri; the Clinton Company and the Clinton Sales Company, with a plant located at Clinton, Iowa; Penick & Ford, Ltd., Inc., with a plant located at Cedar Rapids, Iowa; Anheuser Busch, Inc., with a plant located at St. Louis, Missouri;
the Union Starch & Refining Company and the Union Sales
17 Company with a plant located at Granite City, Illinois, and American Maiza Products Company, with a plant located at Roby, Indiana, in the Chicago switching area.

6. That, except as may hereafter appear, Respondent A. E. Staley Manufacturing Company sold such syrup delivered in railroad tank cars to such purchasers located in the cities enumerated on the table, introduced into the record herewith as Commission's Exhibit 1, at the delivered prices per cwt. listed below said cities respectively on the dates shown opposite each of said prices respectively; that such syrup was sold and delivered in several types and sizes of containers other than tank cars in carload lots to such purchasers located in said cities respectively by Respondent A. E. Staley Manufacturing Company and by Respondent Staley Sales Corporation in less than carload lots to such purchasers located in Dallas and Farmersville, Texas, at delivered prices per cwt., according to the type and size of the container as set forth in Note "A" to Commission's Exhibit 1.

(The document referred to was marked "Commission's Exhibit 1," and received in evidence.)

Mr. HIER (continuing). 7. That among the sales referred to in Paragraph 6 above are those shown and set forth on a table, introduced into the record herewith as Commission's Exhibit 2.

(The document referred to was marked "Commission's Exhibit 2," and received in evidence.)

Mr. HIER (continuing). All of the data on said Exhibit 2 in black figures are from Respondent's original sales records; and the selection of the particular sales shown on said table has been made and the computations in red figures in the last column on the right on said table have been made by counsel for the Commission; and that said Commission's Exhibit 2 is to be considered with any and/or all other evidence in this cause.

8. That some of such purchasers located in the cities enumerated on Commission's Exhibit 1 and Commission's Exhibit 2 are candy manufacturers who purchase such syrup of like grade and quality for use in the manufacture of candy and are competitively engaged in the sale of such candy to various customers for resale, such as wholesalers, chain stores, and retailers located in the several states of the United States;

That such syrup is used to some extent in the manufac-
18 ture of most kinds of candy and is one of the major raw materials used in the production of many varieties, constituting from 5 to 90 per cent of the finished weight thereof; and that the prices paid for such syrup are a substantial part of the total raw material cost and total cost of manufacturing an extensive line of candies having a wide range of syrup contents and a major portion of the raw material and total cost of manufacturing particular candies having a relatively high syrup content;

That the higher prices paid for such syrup by such candy manufacturers located as aforesaid other than in the City of Chicago, Illinois, contribute to a greater or lesser degree in their having higher raw material costs than those candy manufacturers located in Chicago, Illinois, the degree in each instance depending upon the difference in price and the proportion of such syrup used in the candies manufactured;

That generally such syrup is used in greater proportion in candies which are sold by such candy manufacturers at but a few cents per pound and at narrow margins of profit; and, as to candies so priced and which bear no differentiating name or brand, candy manufacturers may attract customers by selling such candies at as little as 1/8th of a cent per pound lower than competitors, and this is especially true in selling such candies to chain stores

and other purchasers who buy such candies in large quantities and to whom such a small difference in price is determinative in placing their business;

That under such circumstances candy manufacturers paying such higher prices for such syrup may sell candies at competitive prices only by absorbing the higher syrup costs, or attempt to recover such increased syrup costs by increasing the price of candies, and selling them upon a non-price basis; that the result in either case is to reduce profit either directly through the absorption of such higher syrup costs or indirectly through reduced volume of sales of high syrup content candies at higher than competitive prices, at which such higher prices such candies can no longer be sold to such volume purchasers.

That the lower profits of these candy manufacturers paying higher prices for such syrup diminishes their incentive or desire to compete with those candy manufacturers paying the lower prices for such syrup and may deter potential new candy manufac-
19 turers from entering the industry in cities where they would pay the higher syrup costs.

9. That some of such purchasers located in the cities enumerated on Commission's Exhibit 1 and Exhibit 2 are engaged in the business of producing syrup for table use by mixing such corn syrup with other ingredients for sale to wholesalers, chain stores, and other food product distributors; that mixed table syrups contain approximately 85 percent of such corn syrup and a typical and usual method of packaging and sale is in a case containing six ten-pound cans or sixty pounds net of table syrup of which approximately fifty pounds is such corn syrup.

That the higher prices paid for such corn syrup by such syrup mixers located as aforesaid other than in Chicago, Illinois, contribute to a greater or lesser degree to higher raw material and total cost than those of syrup mixers located in Chicago, Illinois, the degree in each instance depending upon the difference in the price paid for such syrup;

That syrup mixers may attract customers by selling such mixed syrup at but five cents per case lower than a competitor, and the savings in the cost of such syrup by mixers paying lower prices, when utilized to reduce the price of table syrup, substantially diminishes the sales of mixed table syrup by such mixers paying the higher prices for such corn syrup; or such lower prices of mixed table syrup are met by the syrup mixers paying the higher prices for such corn syrup;

That in either case profits are reduced, and the diminution of profit diminishes the incentive of existing syrup mixers, paying

the higher prices to compete with syrup mixers paying the lower prices, and may deter potential new syrup mixers from entering the industry in cities where they would pay the higher prices for such corn syrup.

What I have just read is correct and agreeable to counsel for the Respondents, is that right, Mr. Spiess and Mr. La Forgee?

Mr. La Forgee. Counsel for the Respondents except. Counsel for the Respondents and each of them make the above and foregoing stipulation solely and only for the case which is now submitted to the Commission, and for the determination of the issues therein submitted, together with all the other evidence which may be introduced in the case, and that the same shall not be taken as admissions or declarations against the Respondents or either of them in any other suits or proceedings than the above-entitled cause.

Mr. Hier. Mr. Examiner, the stipulation which has just been read into the record is a partial stipulation and will be, I assume, supplemented either by a further stipulation or by testimony. Some matters have to be worked out, and counsel for neither side are in position to do so at present. Consequently we would like to ask that this case be adjourned until ten o'clock next Tuesday morning, October 15th, in this city.

Mr. La Forgee. Mr. Hier, if I may be permitted I think there should be a stipulation and agreement that as to this stipulation of facts it is understood and agreed that both parties may at any subsequent time raise any objection as to the competency of the evidence as set forth in the foregoing stipulation, and that it may be considered with the same force and effect as severally made to each of the several paragraphs in the stipulation which had been presented.

Mr. Hier. It is agreeable to counsel for the Commission, Mr. Examiner, that reservations or exceptions to materiality, relevancy or competency may be made to any part of anything which is stipulated in the record. The stipulation simply purports to show what witnesses would testify to if called.

Trial Examiner Hornor. All right then, gentlemen, the hearing is now closed and *and* adjournment is taken to reconvene in Room 1123, New Post Office Building, Chicago, Illinois, at ten a. m. on October 15th, 1940.

(Whereupon, at 10:30 o'clock a. m. an adjournment was taken until 10:00 o'clock a. m. of Tuesday, October 15th, 1940.)

21 Before the Federal Trade Commission

[Caption—3803]

ROOM 1123, NEW POST OFFICE BLDG.,
CANAL AND VAN BUREN STREETS,
Chicago, Illinois, Tuesday October 15, 1940

Met pursuant to adjournment, at 10:00 o'clock a. m.
Before JOHN L. HORNOR, Trial Examiner.
Appearances: Frank Hier, Esq., attorney, appearing on behalf of the Federal Trade Commission. (No one appearing on behalf of Respondents.)

PROCEEDINGS

Trial Examiner HORNOR. The hearing in the matter of A. E. Staley Manufacturing Company, Docket No. 3803, is reconvened in Room 1123 of the new Post Office Building, Chicago, Illinois. Mr. Frank Hier appears for the Commission. You may proceed, Mr. Heir.

Mr. HEIR. Pursuant to the request of counsel for the
22 Respondents made by telephone, we join in asking the Examiner for a postponement from today until Wednesday, October 23rd, at ten a. m., in order that data proposed by Respondents to be placed in the stipulation now in the process of drafting, may be first checked and agreed upon.

Trial Examiner HORNOR. The motion is granted, and the hearing is now adjourned to reconvene in Room 1123, New United States Post Office Building, Chicago, Illinois, at ten o'clock a. m. on October 23rd, 1940.

(Whereupon, at 10:05 o'clock a. m., the hearing in the above-entitled matter was adjourned.)

23 Before the Federal Trade Commission

[Caption—3803]

ROOM 1121, NEW POST OFFICE BUILDING,
CANAL AND VAN BUREN STREETS,
Chicago, Illinois, Wednesday, October 23, 1940.

Met pursuant to adjournment, at 1:00 p. m.
Before JOHN L. HORNOR, Trial Examiner.
Appearances: Frank Hier, Esq., and P. R. Layton, Esq., Attorneys, appearing on behalf of the Federal Trade Commission. Charles C. La Forgee, Esq., and Carl R. Miller, Esq., (Decatur, Illinois), appearing on behalf of the A. E. Staley Manufacturing Company and The Staley Sales Corporation.

PROCEEDINGS

Trial Examiner HORNOR. This is a reconvening of the hearing in Docket No. 3803, A. E. Staley Manufacturing Company, et al. Let the record show that by agreement the hearing was adjourned from ten o'clock a. m. to one o'clock p. m.

Mr. LA FORGEE. A stipulation is offered between counsel for the Commission and counsel for the Respondents which is as follows: It is further stipulated that witnesses if called by Respondents would testify:

Stipulation as to evidence for respondents

1. That Respondent, A. E. Staley Manufacturing Company, first manufactured Corn Syrup Unmixed (Glucose) in 1920; that when it first endeavored to sell such syrup it found that such syrup, as manufactured by competitors, was being sold at delivered prices in the various markets of the United States; that it found that in Chicago two large factories were manu-
24 facturing such syrup and delivering it in Chicago at prices
1 which were lower than those prices then existing in any other market; that the delivered price in such other markets was generally equal to the Chicago delivered price plus the published freight rate on such syrup from Chicago to destination.

2. That when said Respondent first manufactured such syrup it was not known as a producer of such commodity, and found that buyers were unwilling to pay as much for the Corn Syrup it manufactured as they were for such Corn Syrup with which they were familiar and which was being manufactured by competitors of said Respondent; that therefore, sales by said Respondent were made by first quoting the same prices as were quoted by competitors and then making whatever reduction in price as was necessary to obtain business.

3. That after a short period of time said Respondent found that its Corn Syrup was well received by the trade and that it could sell it as the same price that its competitors were selling; that accordingly, said Respondent then adopted the practice of selling at the same delivered prices as its competitors, whatever they might be.

4. That since June 19, 1936, said Respondent has sold such syrup at the same delivered prices as were quoted by competitors in the markets and at the destinations set forth in Commission's Exhibit No. 1.

5. That in making sales at these competitive delivered prices, said Respondent made available to all buyers of such syrup, various containers in which the commodity could be shipped; that these containers are referred to in footnotes to Commission's Ex-

hibits No. 1 and No. 2; that the selection of the container in which such syrup was shipped was solely at the option of the customer, who selected that container which was best adapted to his plant facilities, his location, and to the quantities which he required.

6. That Commission's Exhibit No. 2 sets forth the detail of specific sales selected by the attorneys for the Commission, and that had any other sales been taken from Respondent's records for the purpose of preparing Commission's Exhibit No. 2, substantially the same comparisons and differences would have resulted.

7. That the quality of such syrup, as manufactured by said Respondent and the various competitors of said Respondent, is substantially the same; that said Respondent is no instance has been able to obtain a premium in its general list or market price for such syrup as quoted to buyers generally in a given market over the general list or market price charged by a competitor in the same market. And said Respondent knows of no instances where a competitor has received a higher general list or market price at any point than that quoted by said Respondent in such market; that purchasers of such syrup allege and claim that they can use such syrup as manufactured by the various competitors of said Respondent for the same purposes and with the same results as they use the syrup manufactured by said Respondent.

8. That at, upon and about the date of the respective sales of such syrup shown in Commission's Exhibit No. 2, the freight rates per hundredweight on Corn Syrup from Decatur to the various points of destination were as shown on Respondent's Exhibit No. 1.

Mr. HIER. Mr. Examiner, Respondent's Exhibit No. 1 I understand is not fully prepared and cannot be prepared for acceptance in the form in which it is to be submitted. Can it be shown on the record that this exhibit when received and O. K.'d by counsel for the Commission and counsel for the Respondents will be inserted in the record at this point as Respondent's Exhibit No. 1?

Trial Examiner HORNOR. It will be received by the Examiner and made a part of the record upon advice to counsel of both parties.

Mr. LA FORGEE (continuing).

9. When one or more manufacturers of Glucose announce an advance in the price of syrup the other manufacturers usually, but not invariably, will announce a similar advance. The price advance has invariably been announced or followed subsequent to an advance in the price of corn; or an advance in cost caused by a decline in byproduct values; and such increased costs are common to all manufacturers.

For many years this industry has generally followed a long established trade practice by which all purchasers of syrup have been permitted to purchase at the old price subsequent to the announcement of an advance. Our competitors (and we have been compelled to meet their competition in those instances where we followed such advance) have told the trade that their price has been advanced, but if the buyer will place an order with them at the price existing prior to the advance it will be accepted.

26 In recent years the customer has been granted as many as five to ten days following the announcement in which to place his order.

The purchaser is presumed to place his order, and all purchasers are presumed to have an equal opportunity to purchase in relationship to their consumption; that is, the quantity they will use in the succeeding thirty days based on their past consumption. In practice these presumptions are not carried out, with the result that some buyers benefit more from the privilege than do others; namely, in the manner following:

A. A large buyer may place an order for his next thirty days' requirements with each of several manufacturers. During the first thirty days the buyer may take all it ordered from one, or part of what it ordered from all. At the end of the thirty days, the buyer will frequently inform its suppliers that the seller will have to extend the time of delivery or cancel the order; and that if cancelled, others will take care of it and receive its business. Fearful of losing the good will of the buyer, the sellers may extend delivery, with the result that the buyer may continue to get the benefit of the older and lower price for sixty, ninety or even one hundred twenty days. The larger buyer is more successful in gaining such extensions than the small buyer, since he can exert more buying power. This results in many instances of the small buyer starting to pay the newer and higher price long before the larger buyer does; and if there have been a series of price advances, resulting from an actively advancing corn market, the cost of syrup being concurrently delivered to two competing buyers may vary as much as thirty, forty, or fifty cents per hundredweight.

B. When a price advance is announced, the brokers or salesmen of the syrup manufacturer who announced or followed the advance will get in touch with all buyers and endeavor to secure orders at the older and lower price. Even though unsuccessful, these representatives, on some occasions, may notify their home offices that they have obtained such order. Since it is not usual to secure purchase order forms from buyers, the home office has no means of checking whether or not such orders are bona fide. Some sellers do send out sales confirmation forms, and we have

occasionally been informed by customers that they sometimes receive one or several such confirmations without knowledge of having placed such an order. The salesman or broker may
27 then endeavor to turn such a booking into an order. The result is a sale made at the older and lower price long after the announcement of an advance. Again the larger buyer, rather than the small one is frequently the beneficiary of such a favor.

C. A third abuse of these terms is brought about by some sellers deliberately offering to take business at the older and lower price from some buyers long after the privilege of buying at that price no longer exists with other buyers. As a result of the foregoing, the Respondent has had incidents such as the following occur:

It was enjoying, and for some time had enjoyed, the business of a customer. A price advance occurred and Respondent entered an order at the request of the customer, which was shipped out in the ensuing four or five weeks. When shipment of the low priced order was completed the customer purchased at the newer and higher price, and then unexpectedly told Respondent that Respondent's competitors had offered to deliver one, two or five tank cars at the older and lower price. When the customer had convinced Respondent that it was meeting competition, Respondent agreed to reprice the order to the lower figure. Respondent has had such offers made to its customers as long as three months after the price advance, and in some cases after the customer had purchased and paid for a shipment invoiced by Respondent at the newer and higher price.

D. A fourth instance relates to purchasers of syrup in tank wagons where buyers are unable to take delivery in tank cars and also have limited storage facilities. On some occasions at the time of an advance in price Respondent has received reports that competitors of Respondent had sold or offered to sell such tank wagon buyers in tank car lots. Such tank cars were invoiced to such buyers at the older and lower price for such syrup in tank car lots. Later, deliveries were made in tank wagon lots from the filling station stocks of the seller and such buyers were charged an additional 10 cents per hundredweight representing the cost of delivery in tank wagons. Such deliveries in tank wagons were made at the older and lower price for several months after the time of the price advance.

The selling methods outlined were in existence prior to the time that the Staley Company ever manufactured syrup. It had
28 no alternative except to follow reports of such competition. Some abuse of these terms occurred years ago, but they have been most seriously abused in the last four years. The Staley Company has not originated or adopted these abuses, but it has met the

competition of others where necessary to retain its customers and its business.

In the light of the conditions outlined, the A. E. Staley Manufacturing Company has taken the following actions in order to retain its customers or its business:

A. On several occasions since June 19, 1936, a salesman or broker of the Staley Company has informed us that one on more of our competitors had granted to one or more customers extensions of time within which to take delivery of syrup formerly booked at the older and lower price. Some such extensions have been for as long as thirty, sixty, and ninety days. The information as to our competitors' action was unsupported except by the verbal statement of the buyer or buyers to the salesman or broker. The Staley Company, believing such report to be true, has then granted similar extensions—sometimes to all buyers in all markets, and on some occasions to only the particular purchasers involved.

B. On numerous occasions since June 19, 1936, at the time of an advance in our price the A. E. Staley Manufacturing Company has received from its salesmen or brokers word or notification to enter an order or booking for a large number of customers, some of whom the Staley Company had not previously sold. In the latter instance the order is usually cancelled some thirty days later because of a refusal of the buyer to give shipping instructions. However, when there has been a further upward change in price during the thirty days, so that the difference in price between the new list and the order is substantial, at has been given shipping instructions by the buyer and has made shipment. We suspect, but do not know, that some such bookings for customers were made without the knowledge of the buyer, and shipping instructions were given later, and at a time when competing buyers purchased at the newer and higher price.

C. On numerous occasions since June 19, 1936, and at the time of an advance in our price, we have accepted orders from all customers at the older and lower price. These orders were filled and shipment made within the specified time. Subsequent to
29 that on several occasions candy manufacturers have informed the Staley Company verbally and without supporting evidence, that one or more of our competitors had communicated with them and told them that without the knowledge of the buyer an order had been entered thirty or more days previously for the buyer, and that our competitor or competitors were prepared to make delivery at the older and lower price. The buyer offered us the business at the lower price, and the order was accepted. At the time of the acceptance the Staley Company accepted orders from other competing buyers at the newer and higher price.

D. On several occasions since Jun' 19, 1936, Respondent has received reports from tank wagon buyers that competitors had offered to sell them tank cars of syrup and to deliver such syrup in tank wagon lots at a later time. Such reports came in the form of verbal statements of the buyer to Respondent or to salesmen of the Respondent. Respondent believing such reports to be true, has sold such tank wagon buyers tank car lots at the older and lower price subsequent to a price advance and then delivered in tank wagon lots, charging the buyer 10 cents per hundredweight for such delivery at the time of delivery. Such deliveries were made for several months subsequent to the price advance. At the time such deliveries were made Respondent has, on some occasions, delivered syrup to competing buyers at the newer and higher price.

The difference between the older and lower prices and the newer and higher prices referred to above have varied between five and fifty-five cents per hundredweight.

Inasmuch as the foregoing is a stipulation, counsel upon both sides expressly reserve the right to object to the competency and materiality of any of the testimony as to any issues in this case with the same force and effect as if specifically made at the time said stipulation was read, and this relates to each and every number thereof.

Stipulation as to further evidence for Commission

Mr. HIER. It is further stipulated and agreed between counsel for the Commission and counsel for the Respondents that if further witnesses were called by the Commission they would testify;

That on several occasions, and since June 19, 1936, Respondents have increased and reduced their price per hundredweight for Corn Syrup for delivery in all markets by the same amount per hundredweight without and independent of any similar and prior action by competitors.

Off the record.

(There was a discussion off the record.)

Mr. HIER, It is further stipulated and agreed between counsel for the Commission and counsel for the Respondents that except by mutual agreement or by order of the Commission, no further evidence will be presented by either counsel for the Commission or counsel for the Respondents.

Counsel for Respondents expressly waive the preparation and filing of any report by the Trial Examiner.

Mr. LA FORGEE. Reserving unto itself the right to appear before said Commission for final determination of the case according to the rules of practice of the Commission.

Trial Examiner HORNOR. The taking of further testimony is hereby closed subject to the receipt in evidence of Respondents' Exhibit No. 1 as set forth above in the transcript.

The hearing is now closed and adjourned at 1:25 p. m.

(Whereupon, at 1:25 p. m., Wednesday, October 23, 1940, the hearing in the above entitled matter was closed.)

Commission's Exhibit 1

PRICES CHARGED BY A. E. STALEY MFG. CO. FOR 42° C.S.U. PER CWT. IN TANK CARS

PRICE ANNOUNCED	AMOUNT OF CHANGE	NO. DAYS ALLOWED TO ORDER AT OLD PRICE	APPROX. TIME TO COMPLETE SHIPMENT OF ORDERS ENTERED AT PRICE PRIOR TO ANNOUNCEMENT	ILLINOIS			MISSOURI			TEXAS		LOUISIANA		ARKANSAS	IOWA
				CHICAGO	DECATUR	CENTRALIA	ST. JOSEPH	SIOUX	KANSAS CITY	DALLAS	FARMERSVILLE	SHREVEPORT	ALEXANDRIA	LITTLE ROCK	DAVENPORT
1936															
6/19	-0-	-0-	-0-	2.44	2.61	2.61	2.82	.61	2.82	3.22	3.18	3.13	3.04	3.02	2.61
7/6	+$0.15	10	45 days	2.59	2.76	2.76	2.97	.76	2.97	3.37	3.33	3.28	3.19	3.17	2.76
7/17	+ 0.20	None	10 days	2.79	2.96	2.96	3.17	.96	3.17	3.57	3.53	3.48	3.39	3.37	2.96
7/30	+ 0.15	None	10 days	2.94	3.11	3.11	3.32	.11	3.32	3.72	3.68	3.63	3.54	3.52	3.11
8/3	+ 0.20	None	45 days	3.14	3.31	3.31	3.52	.31	3.52	3.92	3.88	3.83	3.74	3.72	3.31
8/19	+ 0.20	None	30 days	3.34	3.51	3.51	3.72	.51	3.72	4.12	4.08	4.03	3.94	3.92	3.51
8/25	- 0.15	-0-	-0-	3.19	3.36	3.36	3.57	.36	3.57	3.97	3.93	3.88	3.79	3.77	3.36
10/5	- 0.15	-0-	-0-	3.04	3.21	3.21	3.42	.21	3.42	3.82	3.78	3.73	3.64	3.62	3.21
12/31				3.04	3.20	3.20	3.40	.20	3.40	3.77	3.74	3.69	3.60	3.59	3.20
1937															
3/25	+$0.10	10	60 days	3.14	3.30	3.30	3.50	.30	3.50	3.87	3.84	3.79	3.70	3.69	3.30
4/7	+ 0.35	None	45 days	3.49	3.65	3.65	3.85	.65	3.85	4.22	4.19	4.14	4.05	4.04	3.65
4/27	+ 0.10	10	45 days	3.59	3.75	3.75	3.95	.75	3.95	4.32	4.29	4.24	4.15	4.14	3.75
7/26	- 0.55	-0-	-0-	3.04	3.20	3.20	3.40	.20	3.40	3.77	3.74	3.69	3.60	3.59	3.20
10/18	- 0.15	-0-	-0-	2.89	3.05	3.05	3.25	.05	3.25	3.62	3.59	3.54	3.45	3.44	3.05
10/25	- 0.15	-0-	-0-	2.74	2.90	2.90	3.10	.90	3.10	3.47	3.44	3.39	3.30	3.29	2.90
11/1	- 0.15	-0-	-0-	2.59	2.75	2.75	2.95	.75	2.95	3.32	3.29	3.24	3.15	3.14	2.75
11/8	- 0.15	-0-	-0-	2.44	2.60	2.60	2.80	.60	2.80	3.17	3.14	3.09	3.00	2.99	2.60
12/1	- 0.15	-0-	-0-	2.29	2.45	2.45	2.65	.45	2.65	3.02	2.99	2.94	2.85	2.84	2.45
12/20				2.29	2.46	2.46	2.68	.46	2.68	3.09	3.06	3.01	2.88	2.89	2.46
1938															
1/5	+$0.05	5	30 days	2.34	2.51	2.51	2.73	.51	2.73	3.14	3.11	3.06	2.93	2.94	2.51
1/31	- 0.05	-0-	-0-	2.29	2.46	2.46	2.68	.46	2.68	3.09	3.06	3.01	2.88	2.89	2.46
2/11	- 0.05	-0-	-0-	2.24	2.41	2.41	2.63	.41	2.63	3.04	3.01	2.96	2.83	2.84	2.41
3/28				2.24	2.42	2.42	2.64	.42	2.64	3.04	3.01	2.95	2.85	2.84	2.41
3/29	+ 0.05	5	45 days	2.29	2.47	2.47	2.69	.47	2.69	3.09	3.06	3.00	2.90	2.89	2.46
5/16	+ 0.05	5	30 days	2.34	2.52	2.52	2.74	.52	2.74	3.14	3.11	3.05	2.95	2.94	2.51
5/31	- 0.05	-0-	-0-	2.29	2.47	2.47	2.69	.47	2.69	3.09	3.06	3.00	2.90	2.89	2.46
7/13	+ 0.05	5	30 days	2.34	2.52	2.52	2.74	.52	2.74	3.14	3.11	3.05	2.95	2.94	2.51
7/18	- 0.05	-0-	-0-	2.29	2.47	2.47	2.69	.47	2.69	3.09	3.06	3.00	2.90	2.89	2.46
8/2	- 0.05	-0-	-0-	2.24	2.42	2.42	2.64	.42	2.64	3.04	3.01	2.95	2.85	2.84	2.41
8/9	- 0.10	-0-	-0-	2.14	2.32	2.32	2.54	.32	2.54	2.94	2.91	2.85	2.75	2.74	2.31
9/19	+ 0.05	5	60 days	2.19	2.37	2.37	2.59	.37	2.59	2.99	2.96	2.90	2.80	2.79	2.36
10/3	- 0.05	-0-	-0-	2.14	2.32	2.32	2.54	.32	2.54	2.94	2.91	2.85	2.75	2.74	2.31
10/5	- 0.05	-0-	-0-	2.09	2.27	2.27	2.49	.27	2.49	2.89	2.86	2.80	2.70	2.69	2.26
11/14	+ 0.10	5	60 days	2.19	2.37	2.37	2.59	.37	2.59	2.99	2.96	2.90	2.80	2.79	2.36
12/12	+ 0.16	5	45 days	2.29	2.47	2.47	2.69	.47	2.69	3.09	3.06	3.00	2.90	2.89	2.46
1939															
2/6	+$0.10	-0-	-0-	2.19	2.37	2.37	2.59	2.37	2.59	2.99	2.96	2.90	2.80	2.79	2.36
4/10															2.37
4/19	+ 0.05	5	45 days	2.24	2.42	2.42	2.64	2.42	2.64	3.04	3.01	2.95	2.85	2.84	2.42
7/7	- 0.05	-0-	-0-	2.19	2.37	2.37	2.59	2.37	2.59	2.99	2.96	2.90	2.80	2.79	2.37
7/24	- 0.10	-0-	-0-	2.09	2.27	2.27	2.49	2.27	2.49	2.89	2.86	2.80	2.70	2.69	2.27
8/15	+ 0.05	5	60 days	2.14	2.32	2.32	2.54	2.32	2.54	2.94	2.91	2.85	2.75	2.74	2.32
8/25	+ 0.10	5	60 days	2.24	2.42	2.42	2.64	2.42	2.64	3.04	3.01	2.95	2.85	2.84	2.42
9/2	+ 0.10	None	45 days	2.34	2.52	2.52	2.74	2.52	2.74	3.14	3.11	3.05	2.95	2.94	2.52
9/5	+ 0.10	None	45 days	2.44	2.62	2.62	2.84	2.62	2.84	3.24	3.21	3.15	3.05	3.04	2.62
9/6	+ 0.10	None	30 days	2.54	2.72	2.72	2.94	2.72	2.94	3.34	3.31	3.25	3.15	3.14	2.72
9/11	- 0.10	-0-	-0-	2.44	2.62	2.62	2.84	2.62	2.84	3.24	3.21	3.15	3.05	3.04	2.62
9/27	- 0.10	-0-	-0-	2.34	2.52	2.52	2.74	2.52	2.74	3.14	3.11	3.05	2.95	2.94	2.52
10/4	- 0.10	-	-	2.24	2.42	2.42	2.64	2.42	2.64	3.04	3.01	2.95	2.85	2.84	2.42
10/25	- 0.10	-	-	2.14	2.32	2.32	2.54	2.32	2.54	2.94	2.91	2.85	2.75	2.74	2.32
11/20	- 0.05	-	-	2.09	2.27	2.27	2.49	2.27	2.49	2.89	2.86	2.80	2.70	2.69	2.27
11/29	+ 0.05	5	70 days	2.14	2.32	2.32	2.54	2.32	2.54	2.94	2.91	2.85	2.75	2.74	2.32
12/5	+ 0.05	5	90 days	2.19	2.37	2.37	2.59	2.37	2.59	2.99	2.96	2.90	2.80	2.79	2.37

42° C.S.U. 5¢ per cwt. less than above prices.
44° C.S.U. 7¢ per cwt. more than above prices.
45° C.S.U. 14¢ per cwt. more than above prices.

To arrive at Delivered Barrel prices add the following amount to the tank car price:

Chicago, Illinois	33¢ per cwt.	St. Joseph, Mo., Kansas City, Mo.	36¢ per cwt. (Year 1937 - 37¢ per cwt.)
Decatur, Illinois	34¢ per cwt.	Dallas, Texas	39¢ per cwt. (Year 1937 - 38¢ per cwt.)
Centralia, Illinois		Little Rock, Ark., Alexandria, La.	37¢ per cwt.
St. Louis, Mo.		Farmersville, Tex.	39¢ per cwt. (Years 1936 & 1937 - 38¢ per cwt.)
Davenport, Iowa		Shreveport, La.	38¢ per cwt.

For small packages add following amounts to delivered barrel price:

Half Barrels	25¢ per cwt.
5 Gal. drums	75¢ per cwt.
10 Gal. drums	65¢ per cwt.

Note "A"

To arrive at delivered price in returnable steel drums deduct following amounts from the delivered barrel price:

Chicago, Ill., St. Louis, Mo.	20¢ per cwt.	Shreveport, La.	10¢ per cwt.
Decatur, Ill., Centralia, Ill., St. Joseph, Mo.	15¢ per cwt.	Dallas, Tex., Farmersville	10¢ per cwt. - 6/19/36 - 3/27/38
Kansas City, Mo., Little Rock, Ark.		Alexandria, La.	thereafter 5¢ per cwt.
Davenport, Iowa			

TABLE SHOWING REPRESENTATIVE SALES BY A. E. STALEY MFG. CO. OF GLUCOSE BETWEEN JUNE 19, 1936 and JANUARY 1, 1940 TO REPRESENTATIVE CANDY AND SYRUP MANUFACTURING PURCHASERS SELECTED TO SHOW DIFFERENCES IN PRICES PAID THEREFOR BY SUCH PURCHASERS LOCATED IN CHICAGO, ILLINOIS AND BY OTHER PURCHASERS LOCATED IN OTHER CITIES.

Commission's Exhibit 2

	STATE	CITY	PURCHASER	DATE	CONTAINER	CAR NUMBER	BAUME DEGREES	INVOICE PRICE	INVOICE PRICE ADJUSTED TO TANK CAR AND 43 BAUME DEGREES BASIS	DIFFERENCE IN ADJUSTED PRICES.
1	Missouri	St. Louis	Jack Rabbit Candy Co.	3/30/37	Car drums	MILW 14307	43	$3.34	$3.20	$0.16
2	Illinois	Chicago	Bunte Bros.	3/31/37	Tank car	ABSX 67	43	3.04	3.04	
3	Missouri	St. Louis	Jack Rabbit Candy Co.	10/26/38	Car drums	NYW 707174	43	2.29	2.15	0.06
4	Illinois	Chicago	E. J. Brach & Sons, Inc.	10/25/38	Tank car	ABSX 53	43	2.09	2.09	
5	Missouri	St. Louis	Jack Rabbit Candy Co.	9/29/39	Car drums	UTC 152044	43	2.30	2.16	0.07
6	Illinois	Chicago	Bunte Bros.	9/25/39	Tank car	ABSX 21	43	2.09	2.09	
7	Iowa	Davenport	Davenport Candy Co.	6/2/37	Tank car	ABSX 80	43	3.20		0.16
8	Illinois	Chicago	E. J. Brach & Sons, Inc.	6/3/37	Tank car	ABSX 48	43	3.04		
9	Iowa	Davenport	Davenport Candy Company	9/26/39	Tank car	ABSX 68	43	2.27		0.18
10	Illinois	Chicago	Bunte Bros.	9/25/39	Tank car	ABSX 21	43	2.09		
11	Iowa	Ottumwa	Walter T. Hall & Co.	7/17/36	Car drums	PRR 528001	43	2.93	2.73	0.29
12	Illinois	Chicago	E. J. Brach & Sons, Inc.	7/20/36	Tank car	ABSX 99	43	2.44	2.44	
13	Iowa	Ottumwa	Walter T. Hall & Co.	12/8/38	Car drums	NAD [illegible]	43	2.59	2.39	0.30
14	Illinois	Chicago	Bunte Bros.	12/6/38	Tank car	ABSX 67	43	2.09	2.09	
15	Iowa	Ottumwa	Walter T. Hall & Co.	9/28/39	Car drums	PRR 505044	43	2.59	2.39	0.30
16	Illinois	Chicago	Curtiss Candy Co.	9/25/39	Tank car	ABSX 60	43	2.09	2.09	
17	Iowa	Sioux City	Johnson Biscuit Co.	5/11/37	Car drums	PA 33565	43	3.70	3.50	0.46
18	Illinois	Chicago	E. J. Brach & Sons, Inc.	5/11/37	Tank car	GATX 19949	43	3.04	3.04	
19	Missouri	St. Joseph	Chase Candy Company	11/27/36	Tank car	ABSX 80	42	3.37	3.42	0.38
20	Illinois	Chicago	E. J. Brach & Sons, Inc.	10/15/36	Tank car	GATX 21664	43	3.04	3.04	
21	Missouri	St. Joseph	Chase Candy Company	4/30/37	Tank car	ABSX 20	42	3.35	3.40	0.36
22	Illinois	Chicago	E. J. Brach & Sons, Inc.	4/28/37	Tank car	ABSX 61	43	3.04	3.04	
23	Missouri	St. Joseph	Chase Candy Company	9/7/39	Tank car	ABSX 46	42	2.44	2.49	0.40
24	Illinois	Chicago	E. J. Brach & Sons, Inc.	9/5/39	Tank car	ABSX 50	43	2.09	2.09	
25	Missouri	Kansas City	Loose Wiles Biscuit Co.	6/5/37	Tank car	ABSX 101	42	3.45	3.50	0.46
26	Illinois	Chicago	E. J. Brach & Sons, Inc.	6/4/37	Tank car	GATX 7333	43	3.04	3.04	
27	Missouri	Kansas City	Loose Wiles Biscuit Co.	11/14/38	Tank car	ABSX 80	42	2.44	2.49	0.40
28	Illinois	Chicago	E. J. Brach & Sons, Inc.	11/15/38	Tank car	ABSX 79	43	2.09	2.09	
29	Missouri	Kansas City	Loose Wiles Biscuit Co.	9/6/39	Tank car	ABSX 50	42	2.44	2.49	0.40
30	Illinois	Chicago	E. J. Brach & Sons, Inc.	9/5/39	Tank car	SHPX 20610	43	2.09	2.09	
31	Arkansas	Little Rock	A. Karcher Candy Company	11/28/36	Car drums	CBQ 15770	43	3.85	3.63	0.59
32	Illinois	Chicago	Bunte Bros.	12/5/36	Tank car	ABSX 78	43	3.04	3.04	
33	Arkansas	Little Rock	A. Karcher Candy Company	9/22/37	Car drums	BO 27324	43	3.81	3.59	0.55
34	Illinois	Chicago	Bunte Bros.	10/11/37	Tank car	ABSX 47	43	3.04	3.04	
35	Louisiana	Shreveport	Shreveport Syrup Company	4/6/37	Tank car	ABSX 101	43	3.69	3.69	0.65
36	Illinois	Chicago	Squire Dingee Company	4/6/37	Tank car	ABSX 46	42	2.99	3.04	
37	Louisiana	Shreveport	Shreveport Syrup Company	9/26/38	Tank car	ABSX 96	43	2.74	2.74	0.60
38	Illinois	Chicago	Oelerich & Berry Company	9/28/38	Tank car	ABSX 88	42	2.09	2.14	
39	Louisiana	Shreveport	Shreveport Syrup Company	4/15/39	Tank car	ABSX 100	42	2.75	2.80	
40	Illinois	Chicago	Oelerich & Berry Company	3/29/39	Tank car	ABSX 21	42	2.14	2.19	0.61
41	Illinois	Chicago	Squire Dingee Company	3/31/39	Tank car	ABSX 47	42	2.14	2.19	
42	Texas	Dallas	Brown Cracker & Candy Co.	5/7/37	Car Drums	PA 567845	43	4.05	3.77	0.73
43	Illinois	Chicago	E. J. Brach & Sons, Inc.	5/11/37	Tank car	GATX 15949	43	3.04	3.04	
44	Texas	Dallas	Consolidated Candy Company	5/17/37	Tank car	ABSX 75	43	3.77		0.73
45	Illinois	Chicago	E. J. Brach & Sons, Inc.	5/24/37	Tank car	GATX 10278	43	3.04		
46	Texas	Dallas	Hughes Candy Sales Company	8/30/39	Car drums	BO 275517	43	3.23	2.89	0.80
47	Illinois	Chicago	E. J. Brach & Sons, Inc.	8/28/39	Tank car	ABSX 101	43	2.09	2.09	
48	Texas	Dallas	Beckham Candy Company	9/16/39	Car barrels	BO 276511	43	3.28	2.89	0.80
49	Illinois	Chicago	Shotwell Mfg. Company	9/18/39	Tank car	ABSX 61	43	2.09	2.09	
50	Texas	Dallas	Martin Candy Company	11/1/39	Car barrels	BO 278985	43	3.33	2.94	0.85
51	Illinois	Chicago	E. J. Brach & Sons, Inc.	11/6/39	Tank car	ABSX 21	43	2.09	2.09	
52	Texas	Farmersville	Baker Hartt Corporation	3/4/38	Tank car	ABSX 21	43	3.01		0.77
53	Illinois	Chicago	E. J. Brach & Sons, Inc.	3/7/38	Tank car	ABSX 66	43	2.24		
54	Texas	Farmersville	Baker Hartt Corporation	4/17/39	Tank car	ABSX [illegible]	43	2.96		0.77
55	Illinois	Chicago	E. J. Brach & Sons, Inc.	4/14/39	Tank car	ABSX 78	43	2.19		

NOTES:
1. All data in the above table except in column headed "DIFFERENCE" furnished by A. E. Staley Mfg. Company from its original records.
2. Each entry in the above table represents the sale and shipment of one tank car or carload of glucose by the A. E. Staley Mfg. Company.
3. All prices in the above table are for 100 pounds of glucose.
4. Adjusted prices are obtained as follows:
   - a - add 5¢ per cwt to price of 42 degree glucose to obtain price per cwt of 43 degree
   - b - deduct 35 ¢ per cwt from price in barrels to obtain tank car price per cwt in Chicago
   - c - deduct 39 ¢ " " " " " " " " " " " " " Dallas
   - d - deduct 14 ¢ per cwt from price in drums to obtain tank car price per cwt where shipped to St. Louis, Mo.
   - e - deduct 20 ¢ " " " " " " " " " " " " " " Sioux City and Ottumwa, Iowa.
   - f - deduct 22 ¢ " " " " " " " " " " " " " " Little Rock, Arkansas.
   - g - deduct 28 ¢ " " " " " " " " " " " " " " Dallas, Texas until 12/20/37 and 34¢ thereafter.

Schedule of Freight Rates per Hundredweight Applicable to Respective Sales by A. E. STALEY MANUFACTURING COMPANY, as Shown by Commission's Exhibit No. 2

	City	Purchaser	Date	Car No.	Freight from Decatur to destination
1	St. Louis	Jack Rabbit Candy Company	3-30-37	MILW 14307	$0.10
2	Chicago	Bunte Brothers	3-31-37	AFSX 67	.14
3	St. Louis	Jack Rabbit Candy Company	10-26-38	MILW 707174	.11
4	Chicago	E. J. Brach and Sons, Inc	10-25-38	AFSX 53	.155
5	St. Louis	Jack Rabbit Candy Company	9-29-39	NYC 152044	.11
6	Chicago	Bunte Brothers	9-25-39	AFSX 21	.155
7	Davenport	Davenport Candy Company	6- 2-37	AFSX 80	.13375
8	Chicago	E. J. Brach and Sons, Inc	6- 3-37	AFSX 48	.14
9	Davenport	Davenport Candy Company	9-26-39	AFSX 48	.14
10	Chicago	Bunte Brothers	9-25-39	AFSX 21	.155
11	Ottumwa	Walter T. Hall and Co	7-17-36	PRR 540601	.2675
12	Chicago	E. J. Brach and Sons, Inc	7-20-36	AFSX 93	.1498
13	Ottumwa	Walter T. Hall and Co	12- 8-38	WAB 82485	.27
14	Chicago	Bunte Brothers	12- 6-38	AFSX 67	.155
15	Ottumwa	Walter T. Hall and Co	9-28-39	PRR 595464	.27
16	Chicago	Curtiss Candy Company	9-23-39	AFSX 60	.155
17	Sioux City	Johnson Biscuit Company	5-11-37	PA 33563	.36
18	Chicago	E. J. Brach and Sons, Inc	5-11-37	GATX 15949	.14
19	St. Joseph	Chase Candy Company	11-27-36	AFSX 20	.34775
20	Chicago	E. J. Brach and Sons, Inc	10-15-36	GATX 24664	.1498
21	St. Joseph	Chase Candy Company	4-30-37	AFSX 20	.34775
22	Chicago	E. J. Brach and Sons, Inc	4-28-37	AFSX 61	.14
23	St. Joseph	Chase Candy Company	9- 7-39	AFSX 46	.36
24	Chicago	E. J. Brach and Sons, Inc	9- 5-39	AFSX 50	.155
25	Kansas City	Loose Wiles Biscuit Co	6- 5-37	AFSX 150	.325
26	Chicago	E. J. Brach and Sons, Inc	6- 4-37	GATX 7333	.14
27	Kansas City	Loose Wiles Biscuit Co	11-14-38	AFSX 80	.36
28	Chicago	E. J. Brach and Sons, Inc	11-15-38	AFSX 79	.155
29	Kansas City	Loose Wiles Biscuit Co	9- 6-39	AFSX 60	.36
30	Chicago	E. J. Brach and Sons, Inc	9- 5-39	SHPX 20610	.155

	City	Purchaser	Date	Car No.	Freight from Decatur to destination
31	Little Rock	A. Karcher Candy Co	11-28-36	CBQ 15770	$0.535
32	Chicago	Bunte Brothers	12- 5-36	AESX 78	.1498
33	Little Rock	A. Karcher Candy Co	9-22-37	B&O 271324	.50
34	Chicago	Bunte Brothers	10-11-37	AESX 47	.14
35	Shreveport	Shreveport Syrup Co	4- 6-37	AESX 101	.61
36	Chicago	Squire Dingee Company	4- 6-37	AESX 45	.14
37	Shreveport	Shreveport Syrup Co	9-26-38	AESX 96	.67
38	Chicago	Oelerich and Berry Co	9-28-38	AESX 88	.155
39	Shreveport	Shreveport Syrup Co	4-15-39	AESX 400	.67
40	Chicago	Oelerich and Berry Co	3-29-39	AESX 21	.155
41	Chicago	Squire Dingee Company	3-31-39	AESX 47	.155
42	Dallas	Brown Cracker & Candy Co	5- 7-37	PA 567845	.7276
43	Chicago	E. J. Brach and Sons, Inc	5-11-37	GATX 15949	.14
44	Dallas	Consolidated Candy Co	5-17-37	AESX 75	.68
45	Chicago	E. J. Brach and Sons, Inc	5-24-37	GATX 10278	.14
46	Dallas	Hughes Candy Sales Co	8-30-39	B&O 275517	.75
47	Chicago	E. J. Brach and Sons, Inc	8-28-39	AESX 101	.155
48	Dallas	Beckham Candy Company	9-16-39	B&O 276511	.75
49	Chicago	Shotwell Mfg. Company	9-18-39	AESX 61	.155
50	Dallas	Martin Candy Company	11- 1-39	B&O 278985	.75
51	Chicago	E. J. Brach and Sons, Inc	11- 6-39	AESX 21	.155
52	Farmersville	Baker Hartt Corporation	3- 4-38	AESX 21	.72
53	Chicago	E. J. Brach and Sons, Inc	3- 7-38	AESX 66	.155
54	Farmersville	Baker Hartt Corporation	4-17-39	AESX 84	.72
55	Chicago	E. J. Brach and Sons, Inc	4-14-39	AESX 78	.155

10/25/40
jm

35 Before Federal Trade Commission

[Caption—3803]

Order as to respondent's exhibits

Entered Oct. 30, 1940

Counsel for the Commission, and counsel for the respondent, have filed a schedule of freight rates in accordance with an agreement, entered into at the hearing held at Chicago, Illinois, in the above matter, that this schedule of freight rates, when agreed to in writing by counsel for each side, its to be submitted to the Trial Examiner to be received in evidence. A letter from Carl R. Miller, attorney for respondent, endorsed by counsel for the Commission, having been filed with the Trial Examiner, is attached hereto.

It is hereby ordered that the schedule of freight rates submitted as above on two sheets, be received in evidence as Respondent's Exhibits 1–A and 1–B, and made a part of this record.

Dated this 30th day of October 1940.

JOHN L. HORNER,
Trial Examiner.

JLH/ML.

Before Federal Trade Commission

[Caption—3803]

Findings as to the facts and conclusion

June 10, 1942.

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints
36 and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on June 1, 1939, issued and subsequent served its complaint in this proceeding against respondents A. E. Staley Manufacturing Company, a corporation, and The Staley Sales Corporation, a corporation, charging them with violation of the provision of subsection (a) of Section 2 of the said Clayton Act, as amended. After the issuance of said complaint and the filing of respondents' answer thereto, certain stipulations as to the facts were read into the record and certain exhibits were introduced in evidence in support of and in opposition to the allegations of

said complaint at hearings before an examiner of the Commission theretofore duly designated by it, and said stipulations and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission on the complaint, answer, stipulations as to the facts and other evidence, and briefs in support of and opposition to the complaint (oral argument not having been requested); and the Commission, having duly considered the same and being now fully advised in the premises, makes this its findings and its conclusion drawn therefrom:

Findings as to the facts

Paragraph One. Respondent A. E. Staley Manufacturing Company is a corporation organized and existing under the laws of the State of Dalaware, having its principal office and place of business on East Eldorado Street, Decatur, Illinois. Respondent The Staley Sales Corporation is a corporation organized and existing under the laws of the State of Illinois, having its office and principal place of business on East Eldorado Street, Decatur, Illinois. All of the capital stock of the latter respondent, except for the qualifying shares necessarily held by its directors is owned by respondent A. E. Staley Manufacturing Company.

Paragraph Two. Respondent A. E. Staley Manufacturing Company is a processor and refiner of corn products and owns and operates in Decatur, Illinois, a plant which has a capacity for
37 processing approximately 50,000 bushels of corn per day.

Among the products derived from such processing and refining of corn is glucose or corn syrup unmixed. For many years last past and at all times since June 19, 1936, both respondents have been engaged in the business of selling and distributing glucose produced at said plant to purchasers located in the several States of the United States. As a result of such sales, glucose or corn syrup unmixed and other products of such processing and refining of corn have been transported from Decatur, Illinois, to purchasers located in the several States of the United States, and respondents have maintained a course of trade in such products in commerce among and between the several States of the United States.

In the sale and distribution of glucose or corn syrup unmixed, respondents are in competition with other concerns who sell and distribute similar syrup to purchasers in the several States of the United States. Among such competitors of respondents are Corn Products Refining Company and Corn Products Sales Company, with plants at Chicago, Illinois, and Kansas City, Missouri; Clin-

ton Company and Clinton Sales Company, with a plant at Clinton, Iowa; Penick & Ford, Limited, Inc., with a plant at Cedar Rapids, Iowa; Anheuser-Busch, Inc., with a plant at St. Louis, Missouri; Union Starch & Refining Company and Union Sales Company, with a plant at Granite City, Illinois; and American Maize-Products Company, with a plant at Robey, Indiana, in the Chicago switching area.

Paragraph Three. Glucose or corn syrup unmixed is widely used in the manufacture of candy and in the mixing of table syrups. Among the purchasers of such glucose from respondents are customers located in Chicago, Decatur, and Centralia, Illinois; St. Joseph, St. Louis, and Kansas City, Missouri; Dallas and Farmersville, Texas; Shreveport and Alexandria, Louisiana; Little Rock, Arkansas; Davenport, Ottumwa, and Sioux City, Iowa.

Respondents sell glucose or corn syrup unmixed strictly upon a delivered price basis. Their lowest price, or base price, for such glucose is f. o. b. Chicago in railroad tank car lots, and their prices to all other purchasers in such quantities, wherever located, are equivalent or approximately equivalent to their prices to purchasers in Chicago plus freight from Chicago to the purchaser's location.

38 As among customers located in the cities named, and on the dated shown in the following tabulation, respondents' prices per hundredweight for 43° glucose in tank car lots were as follows.

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill	$2.94	$3.04	$2.29	$2.09
Decatur, Ill	3.11	3.20	2.47	2.27
Centralia, Ill	3.11	3.20	2.47	2.27
St. Louis, Mo	3.11	3.20	2.47	2.27
Davenport, Ia	3.11	3.20	2.46	2.27
St. Joseph, Mo	3.32	3.40	2.69	2.49
Kansas City, Mo	3.32	3.40	2.69	2.49
Little Rock, Ark	3.52	3.59	2.89	2.69
Alexandria, La	3.54	3.60	2.90	2.70
Shreveport, La	3.63	3.69	3.00	2.80
Farmersville, Texas	3.68	3.74	3.06	2.86
Dallas, Texas	3.72	3.77	3.09	2.89

At all times since June 19, 1936, substantially the same differentials in price as those shown above have existed between and among respondents' customers located in the cities named.

As heretofore stated, respondents' prices on glucose or corn syrup unmixed vary as between purchasers in different cities according to the Chicago price plus the amount of the railroad freight rate on such glucose from Chicago to the purchaser's location. However, all sales of glucose made by respondents are filled with glucose produced in and shipped from their plant in Decatur, Illinois; and, consequently, the price differences as among

purchasers which result from respondents' pricing plan as set forth herein do not merely reflect differing transportation costs. This is illustrated in the following tabulation in which sales by respondents to purchasers in various cities are compared with substantially concurrent sales to purchasers in Chicago. In this tabulation the prices per hundredweight charged purchasers and the price differences between such purchasers are shown, together with the freight rates from Decatur, Illinois, to the location of each purchaser and the differences between such freight rates.

39 Location of purchaser	Delivered prices per cwt.	Price difference per cwt.	Freight rates per cwt. from Decatur	Freight rate difference per cwt.
St. Louis, Mo	$3.20	$0.16	$0.10	$0.04–
Chicago, Ill	3.04		.14	
St. Louis, Mo	2.15	.06	.11	.045–
Chicago, Ill	2.09		.155	
St. Louis, Mo	2.16	.07	.11	3.045–
Chicago, Ill	2.09		.155	
Davenport, Ia	3.20	.16	.134	.006–
Chicago, Ill	3.04		.14	
Davenport, Ia	2.27	.18	.14	.015–
Chicago, Ill	2.09		.155	
Ottumwa, Ia	2.73	.29	.27	.12
Chicago, Ill	2.44		.15	
Ottumwa, Ia	2.39	.30	.27	.115
Chicago, Ill	2.09		.155	
Ottumwa, Ia	2.39	.30	.27	.115
Chicago, Ill	2.09		.155	
Sioux City, Ia	3.50	.46	.36	.22
Chicago, Ill	3.04		.14	
St. Joseph, Mo	3.42	.38	.35	.20
Chicago, Ill	3.04		.15	
St. Joseph, Mo	3.40	.36	.35	.21
Chicago, Ill	3.04		.14	
St. Joseph, Mo	2.49	.40	.36	.205
Chicago, Ill	2.09		.155	
Kansas City, Mo	3.50	.46	.335	.185
Chicago, Ill	3.04		.14	
Kansas City, Mo	2.49	.40	.36	.205
Chicago, Ill	2.09		.155	
Kansas City, Mo	2.49	.40	.36	.205
Chicago, Ill	2.09		.155	
Little Rock, Ark	3.63	.59	.535	.388
Chicago, Ill	3.04		.15	
Little Rock, Ark	3.59	.55	.50	.36
Chicago, Ill	3.04		.14	
Shreveport, La	3.69	.65	.61	.47
Chicago, Ill	3.04		.14	
40 Shreveport, La	2.74	.60	.67	.155
Chicago, Ill	2.14		.155	
Shreveport, La	2.80	.61	.67	.515
Chicago, Ill	2.19		.155	
Dallas, Texas	3.77	.73	.73	.59
Chicago, Ill	3.04		.14	
Dallas, Texas	3.77	.73	.68	.54
Chicago, Ill	3.04		.14	
Dallas, Texas	2.89	.80	.75	.595
Chicago, Ill	2.09		.155	
Dallas, Texas	2.89	.80	.75	.595
Chicago, Ill	2.09		.155	
Dallas, Texas	2.94	.85	.75	.595
Chicago, Ill	2.09		.155	
Farmersville, Texas	3.01	.77	.72	.565
Chicago, Ill	2.24		.155	
Farmersville, Texas	2.96	.77	.72	.565
Chicago, Ill	2.79		.155	

A comparison between the price differences per hundredweight and the freight rate differences per hundredweight illustrates

the lack of justification for said price differences by reason of transportation costs incurred by respondents.

Respondents began the manufacture of glucose or corn syrup unmixed in 1920, at which time two of their present competitors were producing similar glucose at plants located in the Chicago railroad switching district and were selling glucose at delivered prices based upon the Chicago price plus freight from Chicago to point of delivery. When respondents became established as sellers of glucose comparable to that of their competitors, respondents adopted the practice of selling at the same delivered prices as their competitors. Respondents have been, and now are, unable to secure higher prices for their glucose than competitors charge for similar glucose. Respondents have consistently followed the prices for glucose announced by their competitors according
41 to the pricing formula stated: that is, Chicago base plus freight to destination, except in certain instances where respondents have been the first to announce a change in the price of glucose, and in such instances they have announced prices in accord with the pricing formula theretofore in use by their competitors and themselves.

Paragraph Four. When an increase in the price of glucose or corn syrup unmixed is announced by respondents, a period of from 5 to 10 days following the announcement of such increase is allowed in which a purchaser may place an order for his requirements during the next 30 days, for delivery within such period, at the price in effect before the announcement of the increase. This practice of "booking" is theoretically available to all purchasers on equal terms but in practice some buyers benefit more than others and are enabled to purchase glucose at substantially lower prices than other buyers are paying on purchases concurrently made. Discriminations in price resulting from the booking practice occur in various ways, including the following:

(a) A large buyer may place an order for his next 30 days' requirements of glucose with each of several manufacturers. During the first 30 days the buyer may take all the glucose ordered from one manufacturer, or part of what has been ordered from each manufacturer with orders have been placed. At the end of the 30-day period such buyer will frequently inform the manufacturers that they will have to extend the time of delivery or cancel the order which was "booked," and that if canceled, other manufacturers will take care of the buyer and receive the business. Fearful of losing the good will of the buyer, manufacturers may extend the delivery time with the result that the buyer continues to get the benefit of the older and lower price for 60, 90, or even

120 days. A large buyer is more successful in securing such extensions of time than a small buyer because of the greater buying power which he possesses. In many instances this results in a small buyer of glucose paying the new and higher price long before the large buyer is obliged to do so; and if there have been a series of price advances resulting from an actively advancing corn market, the price of glucose or corn syrup unmixed being concurrently delivered to the two competing buyers may vary as much as 30¢, 40¢, or 50¢ per cwt.

(b) When an advance in the price of glucose or corn
42 syrup unmixed is announced, the brokers or salesmen representing the manufacturer seek to secure orders from all buyers at the price in effect prior to the price increase announced. Even though they fail to secure orders, in some instances these sales representatives may notify their home offices that they have obtained orders. The manufacturer does not require signed purchase orders from buyers and, therefore, cannot determine from the face of the orders submitted by brokers or salesmen which are bona fide orders and which are not. Some manufacturers send confirmation forms to reported purchasers, and respondents have occasionally been informed by such customers that they have received one or several such confirmations without any knowledge of having placed the order so confirmed. The broker or salesmen reporting fictitious "bookings" may later endeavor to convert such "bookings" into actual orders, with the result that when he is successful sales are made at the older and lower price long after the announcement of the advance in price. A large buyer is more frequently the beneficiary of such transactions than a small buyer.

(c) Some manufacturers deliberately offer to take business at the lower prices in effect preceding an advance in the price of glucose long after the privilege of buying at the lower price has expired as to other buyers. In some instances respondents have encountered transactions of this nature as long as three months after a price advance.

(d) Some buyers are unable, by reason of lack of storage or delivery facilities, to purchase glucose in tank car lots. Upon the announcement of an advance in the price of glucose, manufacturers have sold or offered to sell tank car lots of glucose to purchasers having no facilities which would permit their purchasing in such quantities and have fulfilled such orders by delivery in tank wagon quantities from their filling station stocks at the usual price differential for such deliveries, and for several months after the price advance have continued such deliveries at the older and lower price in effect before the advance.

Price advantages received by favored buyers as a result of practices such as those outlined in this paragraph have varied from 5¢ to 55¢ per cwt. of glucose. Respondents have engaged in these discriminatory practices, which they assert were in
43 use by their competitors at the time they entered the industry but which have been more frequent and widespread in the last several years. Respondents further assert that they had no alternative except to meet the competition of others in order to retain their customers and business. However, in granting extensions of the delivery time as set out in subparagraph (a), respondents have relied upon the verbal statements of buyers to their salesmen or brokers in determining whether or not such action was required to meet competition. Respondents have engaged in the practices stated in subparagraph (b) when they suspected, but did not have actual knowledge, that the "bookings" in question were being made without the knowledge or authorization of the buyer for whom the glucose was "booked." Respondents have, upon unsupported verbal representations of purchasers as to the action of other manufacturers, made discriminatory sales of glucose in the manner set forth in subparagraph (c). Respondents have made discriminatory sales of glucose to tank wagon buyers in the manner set out in subparagraph (d) upon reports by their salesmen of verbal statements by buyers concerning similar offers said to have been made by respondents' competitors.

Paragraph Five. Glucose or corn syrup unmixed is used to some extent in the manufacture of most kinds of candy and is one of the major raw materials used in the production of many varieties. In candy in which it is used, glucose constitutes from 5 to 90 percent of the finished weight of such candy. The price paid for glucose represents a substantial part of the total raw material cost and the total manufacturing cost of many candies having a wide range of glucose content, and constitutes a major portion of the raw material and total manufacturing costs of candies having a relatively high glucose content.

Some of those who purchase glucose of like grade and quality from respondents, including purchasers located in the cities heretofore enumerated, are candy manufacturers who purchase such glucose for use in the manufacture of candy and who are competitively engaged in the sale of candy so produced to wholesalers, chain stores, retailers, and others located in the several States of the United States and competitively engaged in the resale thereof. The higher prices paid for glucose by candy manufacturers located as aforesaid other than in the city of Chicago, Illinois, contribute in a greater or lesser degree to their hav-

ing higher raw material costs than those candy manu-
44 facturers located in Chicago, the degree in each instance depending upon the difference in the price paid for glucose and the proportion of glucose used in the candies manufactured. Generally, glucose is used in greater proportion in candies which are sold by the manufacturers at but a few cents per pound and at narrow margins of profit. In the case of such low-priced candies bearing no differentiating name or brand, manufacturers thereof may attract customers by selling at as little as one-eighth of a cent per pound lower than competitors, and this is especially true in selling such candies to chain stores and other purchasers buying in large quantities and to whom a small difference in price is determinative in the placing of their business.

Under these circumstances, candy manufacturers who are obliged to pay higher prices for glucose than some of their competitors may sell candies at competitive prices only by absorbing the higher glucose costs or by attempting to recover such higher glucose costs by increasing the price of their candies and selling them upon a non-price basis. The result is to reduce the profit of such candy manufacturers, either directly through the absorption of higher glucose costs or indirectly through selling at higher than competitive prices, which results in a reduced volume of sale of high glucose-content candies because volume purchasers will not buy such candies at higher than competitive prices. The lower profits of candy manufacturers who are obliged to pay higher prices for glucose diminish their incentive or desire to compete with candy manufacturers paying lower prices for glucose and may deter potential candy manufacturers from entering the industry in cities where they would be obliged to pay higher prices for glucose.

Paragraph Six. Glucose or corn syrup unmixed is used in the production of syrups for table use. Among those who purchase glucose from respondents, including purchasers located in the cities heretofore enumerated, are customers engaged in the preparation of table syrups containing glucose for sale to wholesalers, chain stores, and other food product distributors. Such mixed table syrups contain approximately 85 percent of glucose or corn syrup and are usually sold packed in cases which contain six 10-pound cans, or 60 pounds net of mixed table syrup, of which approximately 50 pounds is glucose.

45 The higher prices paid for glucose or corn syrup unmixed by purchasers engaged in the production of table syrups and located as aforesaid other than in Chicago, Illinois, contribute in a greater or lesser degree to higher raw material costs and total costs than the corresponding costs of table syrup

mixers located in Chicago, Illinois, the degree in each instance depending upon the price paid for glucose. Producers of table syrup may attract customers by selling such syrup at prices as little as 5c per case lower than the prices of competitors. The savings in the cost of such syrup resulting from lower glucose prices to some producers, when utilized by those producers to reduce the price of table syrup, substantially diminishes the sales of table syrup by producers thereof paying higher prices for glucose; or, in the alternative, the producers paying higher prices for glucose meet the table syrup prices of their competitors who purchase glucose at lower prices. In either case the profits of producers of table syrups paying higher prices for glucose are reduced, and the reduction of profit diminishes the incentive of syrup mixers paying higher glucose prices to compete with producers of table syrups paying lower glucose prices and may deter potential syrup mixers from entering the industry in cities where they would be obliged to pay higher prices for glucose.

Paragraph Seven. The record does not show that the aforesaid price differences of respondents, as among their customers purchasing glucose of like grade and quality, are such differences as make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

Conclusion

The aforesaid discriminations in price by respondents in the sale of glucose or corn syrup unmixed, as herein set forth, have resulted, and do result, in substantial injury to competition among purchasers of glucose by affording material and unjustified price advantages to some purchasers and not to others, and violate subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved Oc-
46 tober 15, 1941 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act).

By the Commission.

[SEAL] GARLAND S. FERGUSON,
Acting Chairman.

Dated this 10th day of June A. D. 1942.

Attest:

OTIS B. JOHNSON, *Secretary.*

Before Federal Trade Commission

Commissioners: William A. Ayres, Chairman, Garland S. Ferguson, Charles H. March, Ewin L. Davis, Robert E. Freer.

[Caption—3803]

Order to cease and desist

Entered June 10, 1942

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondents, certain stipulations as to the facts read into the record, exhibits introduced in evidence, and briefs in support of and in opposition to the complaint, and the Commission having made its findings as to the facts and its conclusion that respondents have violated subsection (a) of Section 2 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by Act of June 19, 1936 (Robinson-Patman Act):

47 It is ordered that respondents A. E. Staley Manufacturing Company, a corporation, and The Staley Sales Company, a corporation, and their officers, directors, representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of glucose or corn syrup unmixed in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Directly or indirectly discriminating in price between different purchasers of glucose or corn syrup unmixed of like grade and quality in the manner and degree set forth in Paragraph Three of the findings as to the facts herein, or in any manner or degree substantially similar thereto, or from continuing or resuming any such discriminations in price;

(2) Discriminating in price between different purchasers of glucose in the manner or degree set out in Paragraph Four of the findings as to the facts herein, or in any manner or degree substantially similar thereto, or otherwise discriminating in price between purchasers by means of the booking or entry of orders for glucose or corn syrup unmixed where the price differences between purchasers resulting therefrom substantially approximate or exceed those set out in Paragraphs Three and Four of the findings as to the facts herein: Provided, that this shall not prohibit actual sales of glucose or corn syrup unmixed for future delivery which do not involve such discriminations in price at the time of actual sale;

(3) Otherwise discriminating in price as between purchasers of glucose or corn syrup unmixed of like grade and quality where the effect may be substantially to lessen competiton or tend to create a monopoly in the line of commerce in which customers of respondents are engaged, or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination: Provided, that this shall not prevent price differences which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which said glucose or corn syrup is to such purchasers sold or delivered; and provided further, that this shall not prevent respondents from showing that any lower price to any purchaser was made in good faith to meet an equally low price of a competitor of respondents.

It is further ordered that respondents shall, within
48 sixty (60) days after the service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[SEAL] OTIS B. JOHNSON,
Secretary.

[Secretary's certificate to foregoing transcript omitted in printing.]

49 In the United States Circuit Court of Appeals for the Seventh Circuit

October Term, A. D. 1942

Case No. 8072

A. E. STALEY MANUFACTURING COMPANY, A CORPORATION, THE STALEY SALES CORPORATION, A CORPORATION, PETITIONERS *vs.* FEDERAL TRADE COMMISSION, RESPONDENT

Petition to review the order of Federal Trade Commission entered June 10, 1942

Filed Aug. 6, 1942

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioners, A. E. Staley Manufacturing Company and Staley Sales Corporation, respectfully show:

I

That your petitioner, A. E. Staley Manufacturing Company, is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its factory and principal place of business in the City of Decatur, State of Illinois, and that your petitioner, Staley Sales Corporation, is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal place of business in the City of Decatur and State of Illinois, and that both of your petitioners have been and are now carrying on business within the jurisdiction of this Court, to-wit, within the State of Illinois, and elsewhere within the United States; that your petitioner, A. E. Staley Manufacturing Company, manufactures and sells and has manufactured and sold continuously for many years last past in interstate commerce and foreign commerce glucose or corn syrup unmixed.

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II

That on the first day of June 1939 respondent, Federal Trade Commission, in a proceeding entitled, "In the Matter of A. E. Staley Manufacturing Company, The Staley Sales Corporation, Docket No. 3803," issued its complaint against your petitioners, in which complaint it was in terms wholly general alleged among other things that your petitioners were discriminating in price between purchasers of corn syrup of like grade and quality in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 14, 1936 (U. S. C. Title 15 Section 13), without therein charging any specific matter or thing to advise or inform your petitioners of the matter, thing, transaction, or sale upon which said complaint was based and in like manner failed to charge or allege the person or persons with whom said transactions were had or the date, terms of sale, place where sold or where delivered, and without setting forth with any certainty any other matters or things by which your petitioners were advised as to the particulars of the acts claimed to have been in violation of any law of the United States of America.

III

That thereafter your petitioners filed a motion to dismiss the complaint and in the alternative your petitioners moved that the complaint be made more definite and certain on the grounds that the complaint was vague, indefinite, and uncertain and failed to specify any wrongful transactions or conduct by your petitioners,

and that certain paragraphs therein named consisted entirely of conclusions and failed to set forth any facts or instances of discrimination upon which your petitioners could file an answer in conformity with Rule 7 of the Commission. This motion in its entirety was denied by the respondent.

VI

That thereafter your petitioners, saving to themselves all benefits and advantages claimed under the motions by them filed in said cause, filed their answer to the said complaint issued against them, by which answer your petitioners denied each and every material allegation of the complaint except as to the allegations relating to the identity of your petitioners and the nature of their business, which allegations were specifically admitted. In said answer your petitioners again stated that the allegation of the complaint were vague and indefinite and that your petitioners were without any information as to the alleged discriminations and that they were unable to reply definitely and in detail to the charge without the necessary particulars as to dates, persons and as to the commodities sold. Your petitioners specifically denied that they were acting in violation of the said Section 2 of the Clayton Act as amended by the Robinson-atman Act, approved June 14, 1936, and specifically denied that they were discriminating between purchasers as so generally charged in the complaint, and denied that any prices received by them constituted a discrimination or that said prices substantially lessened competition or tended to create a monopoly.

51

V

That thereafter said Federal Trade Commission held hearings before a trial examiner appointed by said Federal Trade Commission and certain stipulations as to the facts were read into the record and certain exhibits were introduced in evidence in support of and in opposition to the allegations of said complaint, and said stipulations and other evidence were duly recorded and filed in the office of the Federal Trade Commission; that your petitioners waived the preparation and filing of any report by the trial examiner and thereafter briefs were filed with the Commission in said proceedings by the attorneys for the Federal Trade Commission and by the attorneys for your petitioners. Thereafter the cause came on for final hearing before the Commission on the complaint, answer, stipulation as to the facts, and other evidence, oral argument having been waived, and was taken under submission by said Commission.

VI

That thereafter on the 10th day of June A. D. 1942, said Commission issued in said proceeding a purported "Findings as to the Facts and Conclusions" together with a purported "Order to Cease and Desist"; that the order directed against your petitioners is in the words and figures following, to wit:

"It is ordered that respondents, A. E. Staley Manufac-
52 turing Company, a corporation, and The Staley Sales Company, a corporation, and their officers, directors, representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of glucose or corn syrup unmixed in commerce, as 'commerce' is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Directly or indirectly discriminating in price between different purchasers of glucose or corn syrup unmixed of like grade and quality in the manner and degree set forth in Paragraph Three of the Findings as to the Facts herein, or in any manner or degree substantially similar thereto, or from continuing or resuming any such discriminations in price;

(2) Discriminating in price between different purchasers of glucose in the manner or degree set out in Paragraph Four of the Findings as to the Facts herein, or in any manner or degree substantially similar thereto, or otherwise discriminating in price between purchasers by means of the booking or entry of orders for glucose or corn syrup unmixed where the price difference between purchasers resulting therefrom substantially approximate or exceed those set out in Paragraphs Three and Four of the Findings as to the Facts herein: Provided, that this shall not prohibit actual sales of glucose or corn syrup for future delivery which do not involve such discriminations in price at the time of actual sale;

(3) Otherwise discriminating in price as between purchasers of glucose or corn syrup unmixed of like grade and quality where the effect may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which customers of respondents are engaged, or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination: Provided, that this shall not prevent price differences which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which said glucose or corn syrup is to such purchasers sold or delivered; and provided further, that this shall not prevent respondents from showing that any lower price to any purchaser was made in good faith to meet an equally low price of a competitor of respondents.

"It is further ordered that respondents shall, within sixty (60) days after the service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order."

VII.

That the effect of the Order of said Commission denying the motion of the petitioners to dismiss the complaint or, in the alternative, that the complaint be made more definite and certain, was adverse to the interests of your petitioners and was beyond the authority and jurisdiction of said Commission.

VIII.

That the effect of the said Order filed June 10, 1942 is adverse to the interests of petitioners and unreasonably and arbitrarily interferes with and restrains your petitioners in the operation of their businesses.

Statement of points

Petitioners allege that said Order filed June 10, 1942, is wholly erroneous and unlawful; that the same is beyond the power and authority of the Commission and if allowed to remain in effect will operate to deprive petitioners of their rights under the Fifth Amendment to Constitution of the United States for the following reasons;

(a) That the proceedings so instituted in said cause and the pretended allegations therein contained are not in due process of law.

(b) That the Order of said Commission denying the motion of petitioners to dismiss the complaint or; in the alternative, that the complaint be made more definite and certain, was unreasonable, arbitrary and was beyond the authority and jurisdiction of said Commission; and that said complaint is so vague and uncertain and indefinite as to make impossible the issuance of any valid order based thereon.

(c) That the said "Findings as to the Facts" of said Commission are in material and controlling respects without substantial support in the evidence received by the said Commission in said proceedings, but are contrary to such evidence; and that each and every one of them are not supported by or based upon any lawful charge against Petitioners under any law of the United States;

54 (d) That the said "Conclusion" of said Commission in said proceedings is not supported by the findings or by the evidence received by the said Commission;

(e) That the Order entitled, "Order to Cease and Desist," so made by the said Commission against your petitioners, is not supported by the record before the said Commission in said proceeding and is beyond the authority and jurisdiction of said Commission;

(f) That in making, entering and publishing its said "Order to Cease and Desist" the said Commission erred in concluding that your petitioners have been guilty of discriminations in price in the sale of glucose or corn syrup unmixed, which have resulted and do result in substantial injury to competition among purchasers of glucose, by affording material and unjustified price advantages to some purchasers and not to others in violation of subsection (a) of Section 2 of an Act of Congress entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for other Purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act).

(g) That no proof was adduced in said proceeding before the said Commission showing or tending to show that your petitioners have committed any act or acts or engaged in any practice or practices prohibited by provisions of subsection (a) of Section 2 of "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes," or that your petitioners have committed any other act or engaged in any other practice cognizable by the said Commission under the said Clayton Act as amended by the Robinson-Patman Act, or warranting the issuance by said Commission of its said "Order to Cease and Desist";

(h) That under the proofs adduced before the said Commission in said proceeding, the said Commission was without authority or jurisdiction to enter any order respecting your petitioners other than an order dismissing its complaint; that the Commission based its order upon erroneous conclusions of law;

(i) That the said Commission erred in taking, or purporting to take jurisdiction over your petitioners by the issuance of its said "Order to Cease and Desist";

(j) That the said "Order to Cease and Desist" is erroneous, contrary to law and wholly void.

55 Prayer for Relief

Wherefore, your petitioners petition for a review of said Order of respondent, Federal Trade Commission, and respectfully pray:

(1) That a certified copy of this petition be forthwith served upon the respondent, Federal Trade Commission, according to law and the rules of this court;

(2) That respondent be required, in conformity to law, to certify to this Honorable Court a transcript of the record in the proceeding wherein said Order was entered, including the testimony of witnesses, exhibits, pleadings, findings, conclusions of law, and the Order of the respondent, Federal Trade Commission.

(3) That said proceedings be reviewed by this Honorable Court and petitioners respectfully pray that the said Order be set aside, vacated, and annulled,

(4) That this Honorable Court exercise its jurisdiction over the parties and subject matter of this petition and grant petitioners such other and further relief in the premises as the rights and equities may require.

And your petitioners will ever pray.

A. E. STALEY MANUFACTURING COMPANY,
STALEY SALES CORPORATION,
By CARL R. MILLER,
CHARLES C. LE FORGEE.
Citizens Building, Decatur, Illinois.
CARL R. MILLER,
A. E. STALEY MANUFACTURING COMPANY.
Decatur, Illinois,
Attorneys for Petitioner.

LE FORGEE, SAMUELS & MILLER,
404 Citizens Building, Decatur, Illinois.
LOUIS A. SPIESS.
1317 F Street NW., Washington, D. C.,
Of Counsel.

Dated at Decatur, Illinois, August —, 1942.

[File endorsement omitted.]

56 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

[Caption—8072]

Designation of the portions of the transcript of record to be contained in the printed record

Filed Sept. 23, 1942

A. E. Staley Manufacturing Company and Staley Sales Corporation, Petitioners, by Charles C. LeForgee and Carl R. Miller, their attorneys, hereby designate that all of the transcript of record be contained in the printed record, including:

Certificate of Otis B. Johnson, Secretary of the Federal Trade Commission, dated September 2, 1942.

Complaint.

Motion to dismiss complaint, or in the alternative, for particulars.

Order of the Commission denying the motion to dismiss complaint or to make complaint more definite and certain.

Answer to Complaint.

Order appointing trial examiner and fixing time and place for taking testimony.

Order of John L. Horner, Trial Examiner, dated October 30, 1940.

Findings as to the Facts and Conclusion, dated June 10, 1942.

Order to Cease and Desist, entered June 10, 1942.

Official Report of Proceedings, pages 1–28 inclusive.

Commission's Exhibit 1.

Commission's Exhibit 2.

Respondent's Exhibit 1–A.

Respondent's Exhibit 1–B.

A. E. STALEY MANUFACTURING COMPANY,
STALEY SALES CORPORATION, *Petitioners.*

CHARLES C. LE FORGEE,
CARL R. MILLER,
Attorneys for Petitioners,
404 Citizens Building, Decatur, Illinois.

[File endorsement omitted.]

58 In United States Circuit Court of Appeals

[Title omitted.]

Minute entry.

And, to wit: On the sixth day of August 1942, there was filed in the office of the Clerk of this Court, a Petition for Review and Statement of Points, which said petition and statement are not copied herein.

In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8072

October Term, 1942, April Session, 1943

A. E. STALEY MANUFACTURING COMPANY, A CORPORATION, ET AL., PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of Order of the Federal Trade Commission

May 10, 1943

Before EVANS, MAJOR, and MINTON, Circuit Judges

Opinion

Filed May 10, 1943

MINTON, Circuit Judge. The petitioners seek to review an order of the Federal Trade Commission which ordered them to cease and desist from certain practices found by the Commis-
59 sion to be in violation of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. A. Sec. 13-(a) (b)). The petitioners challenge the sufficiency of the complaint, the sufficiency of the evidence to support the findings, and the validity of the Commission's conclusions as to discriminatory conduct.

The petitioners filed a timely motion to dismiss the complaint because it was vague, indefinite and uncertain, and alleged only conclusions. The Commission denied the motion. The paragraph of the complaint that charges the discriminations we set forth in the footnote.[1] In the subsequent paragraphs it is alleged that these acts of discrimination substantially lessen competition and tend to create a monopoly in commerce in violation of the statute.

While the complaint charges the cause of action in the words of the statute, we think this was sufficient to advise the petitioners of the nature in general of the complaint. Pleadings before the

[1] "Paragraph Five. Since June 19, 1936 and while engaged as aforesaid in commerce among the several States of the United States and the District of Columbia, the respondents have been and are now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, which commodities are sold for use, consumption or resale within the several States of the United States and the District of Columbia in that the respondents have been and are now selling such commodities to some purchasers at a higher price than the prices at which commodities of like grade and quality are sold by respondents to other purchasers generally competitively engaged with the first mentioned purchasers."

Commission are not required to meet the standards of pleadings in a court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation that characterizes the proceedings of administrative bodies. Consumers Power v. National Labor Relations Board, 113 F. (2d) 38, 43; National Labor Relations Board v. Remington Rand Co., 94 F. (2d) 862, 873; Sunbeam Electric Manufacturing Co. v. National Labor Relations Board, 133 F. (2d) 856. The petitioners were able to take the complaint and stipulate all of the facts in this case. That would seem to be quite persuasive evidence that the petitioners were not misled, but knew full well what the proceedings were all about. We think under the circumstances of this case that petitioners were sufficiently advised of the issues which they were required to meet. The complaint was sufficient.

To sustain an order based upon this complaint, there must be discrimination as to price in commodities sold in commerce, and such discrimination in price must substantially lessen competition or tend to create a monopoly in commerce. If we assume that the Commission properly found that there was discrimination in price of commodities sold in commerce, we look in vain for the other element, that such discrimination in price had the effect "substantially to lessen competition or tend to create a monopoly." There must be some showing of facts or circum-
60 stances that would warrant a finding, and the finding must be made, that the discrimination had the effect substantially to lessen competition or tend to create a monopoly. Clearly, Congress meant something besides the mere showing of discrimination itself.

That the Commission has clearly misapprehended the required elements to be found to sustain the required allegations of the complaint is manifest by the statement in its "Conclusion":

"The aforesaid discriminations in price by respondents in the sale of glucose or corn syrup unmixed, as herein set forth have resulted, and do result, in substantial injury to competition among purchasers of glucose by affording material and unjustified price advantages to some purchasers and not to others, and violate subsection (a) of Section 2 of an Act of Congress * * *."

The Commission seems to think that this element of the offense is a conclusion that follows from discrimination. But it takes discrimination plus the other element as to substantially lessening competition or tending to create a monopoly to sustain the complaint. The latter elements are not conclusions to be drawn from the facts of discrimination. They are essential additional elements of fact that must be proved and incorporated in the findings. Congress was dealing with competition, which it sought to protect,

and monopoly, which it sought to prevent. A showing of discrimination in price is not enough.[2] There must be evidence to support a finding, and there must be a finding based on that evidence to show wherein competition is substantially lessened or monopoly fostered. It is not every discrimination that is unlawful. Congress knew that all discriminations might have some effect upon competition, but Congress was not dealing with the minor effects of discrimination. The discrimination had to be such that it substantially affected competition. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 356, 42 S. Ct. 360, 66 L. Ed. 653. The Commission has failed to make a finding covering these essential elements of the cause of action.

If there were a finding covering these elements essential to support the order, we find no evidence in the record to support such a finding. There should be evidence to prove in what
61 respect the acts of price discrimination substantially lessen competition or promote monopoly. The Commission cannot depend upon a showing of discrimination alone. Congress was not outlawing discrimination. It was outlawing discrimination only when such discrimination was shown to have substantially lessened competition or promoted monopoly.

As this case is to be remanded to the Commission for further proceedings, we will direct the Commission to give further consideration to the defense claimed by the petitioners that such discriminations as they made were made in good faith to meet the lower price of a competitor. We find in the record evidence directed to this defense. The Commission made some subsidiary findings touching the evidence of this claimed defense but did not make any finding as to the ultimate fact of whether the defense had been made out. We think that in the interest of clarity and fair and proper procedure, the Commission should make a finding of fact upon this evidence as to whether or not this claimed defense is made out. To this the petitioners are entitled. Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 197; 61 S. Ct. 845, 85 L. Ed. 1271; Federal Trade Commission v. Curtis Pub. Co., 260 U. S. 568, 580, 43 S. Ct. 210, 67 L. Ed. 408;

[2] "It must be always remembered that no discrimination in price is illegal under section 2 (a) if it does not have the effect of suppressing or injuring competition in one of the respects required by the section. Section 2 (a) prohibits unjustified discriminations in price where the effect may be:

"1) To substantially lessen competition or tend to create a monopoly in any line of commerce.—This language requires more than a mere logical or conceivable possibility of effect on competition, and the Supreme Court has stated the meaning of these words as follows: 'But we do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would, under the circumstances disclosed, probably lessen competition or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.' [Standard Fashion Co. v. Magrane Houston Co., 258 U. S. 346, 356–357.]" Henry Ward Beer, Federal Trade Law and Practice (1942), p. 123.

A. E. Staley Mfg. Co. v. Secretary of Agriculture, 120 F. (2d) 258; Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F. (2d) 554, 563; Tri-State Broadcasting Co. v. Federal Communications Commission, 96 F. (2d) 564, 568.

We think the ends of justice can best be served by remanding the case to the Commission for further consideration and hearings if necessary, in order to show with more clarity, if the Commission can, wherein the discriminations occur and how they substantially lessen competition and promote monopoly, and for proper findings thereon; and for consideration of the defense urged by the petitioners, and for findings in relation thereto. The cause is remanded to the Commission to proceed as it may be advised in the light of this opinion.

A true Copy:
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

62 In United States Circuit Court of Appeals

8072

A. E. STALEY MANUFACTURING COMPANY, A CORPORATION, AND STALEY SALES CORPORATION, A CORPORATION, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the Federal Trade Commission

Judgment

May 10, 1943

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that this cause be, and the same is hereby, remanded to the same Federal Trade Commission for further proceedings in accordance with the opinion of this Court filed this day.

64 In the United States Circuit Court of Appeals
for the Seventh Circuit

[Title omitted.]

Modified findings as to the facts and conclusion—Submitted pursuant to the court's direction of May 10, 1943, remanding the case to the Commission for further proceedings

Filed Sept. 20, 1943

66 Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 13th day of September 1943.

Commissioners: Garland S. Ferguson, Chairman; Charles H. March, Ewin L. Davis, William A. Ayres, Robert E. Freer.

Docket No. 3803

IN THE MATTER OF A. E. STALEY MANUFACTURING COMPANY AND THE STALEY SALES CORPORATION

Modified findings as to the facts and conclusion

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on June 1, 1939, issued and subsequently served its complaint in this proceeding upon respondents A. E. Staley Manufacturing Company, a corporation, and The Staley Sales Corporation, a corporation, charging them with violation of the provisions of subsection (a) of Section 2 of the said Clayton Act, as amended.

After the issuance of said complaint and the filing of re-
67 spondents' answer thereto, certain stipulations as to the facts were read into the record and certain exhibits were introduced in evidence in support of and in opposition to the allegations of said complaint at hearings before an examiner of the Commission theretofore duly designated by it, and said stipulations and other evidence were duly recorded and filed in the office of the Commission. This proceeding then regularly came on for final hearing before the Commission on the complaint, answer, stipulation as to the facts and other evidence, and briefs

in support of and in opposition to the complaint (oral argument not having been requested); and the Commission, having duly considered the same, made its findings as to the facts and its conclusion drawn therefrom.

Thereafter, respondents filed with the United States Circuit Court of Appeals for the Seventh Circuit their petition for review of the Commission's order in this proceeding, and after hearing said cause on brief and oral argument, the said Court on May 10, 1943, filed its opinion and decree remanding the case to the Commission "for further consideration and hearings if necessary, in order to show with more clarity, if the Commission can, wherein the discriminations occur and how they substantially lessen competition and promote monopoly, and for proper findings thereon; and for consideration of the defense urged by the petitioners, and for findings in relation thereto." The Commission, having further considered the matter, makes this its modified findings as to the facts and its conclusion drawn therefrom.

68 FINDINGS AS TO THE FACTS

Paragraph One. Respondent A. E. Staley Manufacturing Company is a corporation organized and existing under the laws of the State of Delaware, having its principal office and place of business on East Eldorado Street, Decatur, Illinois. Respondent The Staley Sales Corporation is a corporation organized and existing under the laws of the State of Illinois, having its office and principal place of business on East Eldorado Street, Decatur, Illinois. All of the capital stock of the latter respondent, except for the qualifying shares necessarily held by its directors, is owned by respondent A. E. Staley Manufacturing Company.

Paragraph Two. (a) Respondent A. E. Staley Manufacturing Company is a processor and refiner of corn products and owns and operates in Decatur, Illinois, a plant which has a capacity for processing approximately 50,000 bushels of corn per day. Among the products derived from such processing and refining of corn is glucose or corn syrup unmixed. For many years last past and at all times since June 19, 1936, both respondents have been engaged in the business of selling and distributing glucose produced at said plant to purchasers located in the several States of the United States. As a result of such sales, glucose, or corn syrup unmixed and other products of such processing and refining of corn have been transported from Decatur, Illinois, to purchasers located in the several States of the United States, and respondents have maintained a course of trade in such products in commerce among and between the several States of the United States.

69 (b) In the sale and distribution of glucose or corn syrup unmixed, respondents are in competition with other con-

cerns who sell and distribute similar syrup to purchasers in the several States of the United States. Among such competitors of respondents are Corn Products Refining Company and Corn Products Sales Company, with plants at Chicago, Illinois, and Kansas City, Missouri; Clinton Company and Clinton Sales Company, with a plant at Clinton, Iowa; Pennick & Ford, Limited, Inc., with a plant at Cedar Rapids, Iowa; Anheuser-Busch, Inc., with a plant at St. Louis, Missouri; Union Starch & Refining Company and Union Sales Company, with a plant at Granite City, Illinois; and American Maize-Products Company, with a plant at Roby, Indiana, in the Chicago switching area.

Paragraph Three. (a) For many years, and at all times since June 19, 1936, respondents have sold glucose or corn syrup unmixed to purchasers wherever located strictly upon a delivered-price basis—that is, a price delivered at the destination specified by the purchaser. The lowest price is quoted in Chicago, and the amount of the delivered price at any other destination has been and is determined by adding to the Chicago price of glucose the amount of the published railroad freight rate from Chicago to the destination of the particular shipment. Under this formula the delivered prices charged by respondents for their glucose vary as between purchasers according to their respective locations. In order to illustrate this, the following are the prices charged by respondents per 100 pounds for 43° glucose in railroad tank-car quantities to purchasers located at the points shown on the dates indicated:

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill	$2.94	$3.04	$2.29	$2.09
Decatur, Ill	3.11	3.29	2.47	2.27
Centralia, Ill	3.11	3.20	2.47	2.27
St. Louis, Mo	3.11	3.20	2.47	2.27
Davenport, Ia	3.11	3.20	2.46	2.27
St. Joseph, Mo	3.32	3.40	2.69	2.49
Kansas City, Mo	3.32	3.40	2.69	2.49
Little Rock, Ark	3.52	3.59	2.89	2.69
Alexandria, La	3.54	3.60	2.90	2.70
Shreveport, La	3.63	3.65	3.00	2.80
Farmersville, Tex	3.68	3.74	3.06	2.86
Dallas, Tex	3.72	3.77	3.09	2.89

Similar price differentials as among purchasers at the various locations named have existed at all times since June 19, 1936, and, of course, price differences have also existed among purchasers at other locations, the amounts of such differentials varying according to the differences in the freight rates from Chicago to the destinations of the several purchasers.

(b) Respondents' manufacturing plant is not, however, located in Chicago, Illinois, but is at Decatur, Illinois, and the glucose which they sell is produced in, and shipped from, Decatur to destinations specified by purchasers. The freight rates on glucose

from Decatur to various destinations are not the same as the freight rates from Chicago to the same destinations. Since the delivered prices charged by respondents for glucose represent and are equivalent to the Chicago base price plus the freight rate from Chicago to destination, such prices do not make only due allowance for the actual cost to respondents of delivery.

(c) To illustrate the fact that the differences in price made
71 by respondents do not merely reflect the differing costs of delivery, actual sales of glucose to a few candy and table syrup manufacturers located in Chicago are compared with substantially concurrent sales of glucose to a few candy and table syrup manufacturers located at other points as shown in the following tabulation, and the difference in delivered prices are shown, as well as the actual costs of delivery incurred by respondents. The prices are expressed in terms of 100 pounds of 43° glucose in tank-car quantities, and the delivery costs in terms of the rates per hundred pounds.

Location of purchaser	Delivered prices	Price difference	Freight rates from Decatur	Delivered prices less cost of delivery	Net difference not due to cost of delivery
St. Louis, Mo	$3.20	$0.16	$0.10	$3.10	$0.20
Chicago, Ill	3.04		.14	2.90	
St. Louis, Mo	2.15	.06	.11	2.04	.105
Chicago, Ill	2.09		.155	1.935	
St. Louis, Mo	2.16	.07	.11	2.05	.115
Chicago, Ill	2.09		.155	1.935	
Davenport, Ia	3.20	.16	.134	3.066	.166
Chicago, Ill	3.04		.14	2.90	
Davenport, Ia	2.27	.18	.14	2.13	.116
Chicago, Ill	2.09		.156	1.935	
Ottumwa, Ia	2.73	.29	.27	2.46	.17
Chicago, Ill	2.44		.15	2.29	
Ottumwa, Ia	2.39	.30	.27	2.12	.185
Chicago, Ill	2.09		.155	1.935	
Sioux City, Ia	3.50	.46	.36	3.14	.34
Chicago, Ill	3.04		.14	2.90	
St. Joseph, Mo	3.42	.38	.35	3.07	.18
Chicago, Ill	3.04		.15	2.89	
St. Joseph, Mo	3.40	.36	.35	3.05	.15
Chicago, Ill	3.04		.14	2.90	
St. Joseph, Mo	2.49	.40	.36	2.13	.195
Chicago, Ill	2.09		.155	1.935	
Kansas City, Mo	3.59	.46	.325	3.175	.275
Chicago, Ill	3.04		.14	2.90	
Kansas City, Mo	2.49	.40	.36	2.13	.195
Chicago, Ill	2.09		.155	1.935	
Little Rock, Ark	3.63	.59	.535	3.095	.205
Chicago, Ill	3.04		.15	2.89	.07
Little Rock, Ark	3.59	.55	.50	3.09	
Chicago, Ill	3.04		.14	2.90	0.18
Shreveport, La	3.69	0.65	0.61	3.08	
Chicago, Ill	3.04		.14	2.90	
72 Shreveport, La	2.74	.60	.67	2.07	.085
Chicago, Ill	2.14		.155	1.985	
Shreveport, La	2.80	.61	.67	2.13	.085
Chicago, Ill	2.19		.155	2.035	
Dallas, Tex	3.77	.73	.73	3.04	.14
Chicago, Ill	3.04		.14	2.90	.19
Dallas, Tex	3.77	.73	.68	3.09	
Chicago, Ill	3.04		.14	2.90	.205
Dallas, Tex	2.89	.80	.75	2.14	
Chicago, Ill	2.09		.155	1.935	
Dallas, Tex	2.94	.85	.75	2.19	.255
Chicago, Ill	2.09		.155	1.935	

Location of purchaser	Delivered prices	Price difference	Freight rates from Decatur	Delivered prices less cost of delivery	Net difference not due to cost of delivery
Farmersville, Tex	$3.01	$0.77	$0.72	$2.29	$0.205
Chicago, Ill	2.24		.155	2.085	
Farmersville, Tex	2.96	.77	.72	2.24	.205
Chicago, Ill	2.19		.155	2.035	
Decatur, Ill	2.42	.18	.00	2.42	.335
Chicago, Ill	2.24		.155	2.085	

In order to put all prices shown in the above tabulation upon a strictly comparable basis, adjustments were made in some instances according to respondents' established scale of differentials for differences in specific gravity of glucose and differences in type of shipping container, but in other instances no adjustments were necessary. The table includes a comparison between respondents' Decatur and Chicago, Illinois, prices. A comparison of each price difference with the corresponding "Net Difference Not Due To Cost of Delivery" reveals the extent to which the delivered price difference is not warranted by actual delivery costs. The table also shows that some buyers are obliged to pay imaginary or "phantom" freight costs and others do not pay all of the delivery costs actually incurred.

73 Paragraph Four. (a) In addition to the discriminations in price described in Paragraph Three, respondents also discriminate in price in other ways. These additional discriminations add to and supplement the discriminations previously described and, considered from the standpoint of the purchasers discriminated against by the pricing system, frequently increase the total amounts of the discriminations. These additional discriminations result from the following acts and practices.

(b) When an increase in the price of glucose is announced by respondents a purchaser may, during a specified period of from 5 to 10 days following such announcement, place an order for his requirements of glucose during the next 30 days for delivery within that period at the price in effect prior to the announced increase. This practice, known as "booking," is followed by all glucose manufacturers. Theoretically, all purchasers are supposed to have equal opportunity to "book" glucose in proportion to their past consumption, but as a matter of fact, some buyers benefit more than others and are enabled to purchase glucose at substantially lower prices than other buyers pay for glucose concurrently purchased. "Bookings" made pursuant to this practice are not firm purchases, but are merely options given to purchasers. The discriminations in price by respondents resulting from "booking" occur in various ways.

(c) A buyer who purchases large quantities of glucose may "book" an order with respondents for his next 30 days' re-

74 quirements of glucose, and may also "book" similar orders with other glucose manufacturers. He may, during the prescribed period, take none or only a part of the glucose "booked" with respondents, and upon the expiration of the 30-day period secure from respondents an extension of delivery time to 60, 90, and, in some instances, 120 days. A buyer who purchases large quantities of glucose is more successful in securing extension of delivery time from respondents than buyers who purchase in smaller quantities. As a result of such extensions granted to some buyers and not to others, respondents sell glucose to some buyers at a lower price than they are concurrently charging other buyers.

(d) When a price increase in announced by respondents, their brokers and salesmen seek orders from all buyers at the price in effect before such announcement. In some instances, even though they fail to secure orders, these sales representatives notify respondents that they have secured orders. The broker or salesman thus reporting fictitious "bookings" may later endeavor to convert and succeed in converting such fictitious "bookings" into actual orders. This results in sales of glucose by respondents at the old and lower price to some purchasers while concurrently selling to other purchasers at higher prices. Buyers who purchase large quantities of glucose are more frequently the beneficiaries of such transactions than are buyers who purchase in smaller quantities.

(e) In some instances where no "booking" is even claimed
75 to have been made, respondents have sold glucose long after the expiration of the "booking" period following a price increase at the old and lower price in effect before the price increase was made, and have concurrently sold to other purchasers at the higher price. Transactions of this type have been made as long as three months after an advance in price.

(f) Because of lack of storage or delivery facilities, some buyers are unable to take delivery of glucose in tank-car lots. Following the announcement of an advance in price, respondents have "booked" glucose in tank-car lots for such purchasers at the old and lower price, and have later made deliveries in tank-wagon lots (adding the usual differential for such deliveries) over a period of several months, while concurrently selling to other buyers at higher prices.

(g) The discriminations in price resulting from the practices described in this paragraph have amounted to from 5 cents to 55 cents per hundred pounds of glucose in sales made by respondents subsequent to June 19, 1936.

Paragraph Five. (a) Glucose or corn syrup unmixed is widely used in the manufacture of candy and table syrups. Many of those who purchase glucose from respondents, including customers

located at the destinations heretofore specifically set out, are engaged in the manufacture of candy or the mixing of table syrup and use glucose purchased from respondents as a raw material in producing such candies and syrups.

(b) Glucose is used in most kinds of candies and is the
76 major raw material in many varieties of candy. It usually constitutes from 5 to 90 percent of the finished weight of the candies in which used, and the cost of such glucose represents a major part of the raw material costs and of the total cost of manufacturing candies having a relatively high glucose content. Generally, glucose is used in greater proportions in candies which are sold by the manufacturers thereof at a few cents per pound and on which the manufacturer's margin of profit is narrow. Frequently such candies are unbranded and a difference in price of 1/8 cent per pound is sufficient to divert business from one manufacturer to another, and this is particularly true in the case of chain stores and others who buy in large quantities. Such a small difference in price to such buyers determines who shall be the recipient of their orders.

(c) Respondents' customers who manufacture candy are engaged in selling such candy to wholesalers, chain stores, and retailers located in the several States, and in the sale and distribution of their candies these manufacturers compete among themselves and with other manufacturers for the available business. Because of the conditions stated, those candy manufacturers who receive the benefit of discriminatory prices granted by respondents have a substantial advantage in selling their candies in competition with manufacturers who are obliged to pay respondents' full price for glucose. This is particularly true as between customers of respondents located in Chicago and customers located in other cities. In order to sell their products in
77 competition with manufacturers who receive the benefits of respondents' discriminations in price, candy manufacturers who pay respondents' full price for glucose must either sell at competitive prices, and in doing so reduce their possible profits by the amount of the discriminations against them, or attempt to sell at higher prices than the favored customers of respondents charge for similar candies, in which event they are unable to secure business from large purchasers and their volume of sales is reduced. These circumstances result in diminishing the incentive or desire, and also the ability of the nonfavored customers to compete with favored customers, and also may deter potential manufacturers of candy from entering such business at locations where they would be obliged to pay higher and discriminatory prices for glucose, thus tending to concentrate the

manufacture of candy of high-glucose content in the manufacturers located in Chicago, Illinois.

(d) As used by customers of respondents in the mixing of table syrups, glucose constitutes about 85 percent of the finished product. The cost of glucose is thus an important factor in the total cost of producing table syrups. Table syrups are sold by the mixers thereof to wholesalers, chain stores, and other distributors of food products. A typical and usual method of packaging such syrups is in cases containing 6 10-pound cans of syrup, or a total net weight of 60 pounds, of which approximately 50 pounds is glucose. A syrup mixer may attract customers and divert trade to himself by selling table syrup at as little as 5 cents per case less than the prices offered by his competitors.

78 (e) Mixers of table syrups who receive the benefits of discriminatory prices on their purchases of glucose from respondents have a substantial advantage in their competition with mixers who are obliged to pay respondents' full prices for glucose. When the price advantage received on glucose is reflected in the selling price of table syrups by mixers thereof who benefit from respondents' discriminations, and such lower prices are not met by the mixers who are obliged to pay respondents' full price for glucose, it results in substantially diminishing the sales of table syrup by nonfavored purchasers and in consequent reduction in their profits. If the nonfavored customers of respondents reduce their prices of table syrup to meet lower prices offered by favored customers of respondents, their profits are reduced. In either case, the diminution of profit reduces the incentive and also the ability of mixers paying higher prices for glucose to compete with mixers who receive the benefits of discriminations in price by respondents, and also may deter potential mixers of table syrup from engaging in that business at locations where they would be obliged to pay higher and discriminatory prices for glucose.

Paragraph Six. (a) Respondents defend the discriminations in price described in Paragraph Three under the provisions of subsection (b) of Section 2 of the Clayton Act, as amended, upon the following grounds: That when they began to manufacture and sell glucose in 1920, other manufacturers of glucose, two of whom are located within the railroad switching district of Chicago,

79 were selling glucose in Chicago at a lower price than elsewhere, and at prices in other markets generally equivalent to the Chicago price plus the published railroad freight rate from Chicago to destination; that for a short period of time respondents quoted the same prices as other manufacturers and then made such reductions as were necessary to secure business; that soon they became established as sellers of glucose of a quality

equal to that of other glucose manufacturers and thereafter sold their product at the same price as other manufacturers; and that respondents are unable to sell their glucose to purchasers at a price higher than the price of other glucose manufacturers and know of no instance where other glucose manufacturers have been able to obtain prices higher than respondents' prices.

(b) On various occasions since June 19, 1936, respondents have increased or reduced their prices for glucose in all markets by the same amount prior to and independently of any similar increase or reduction by other sellers of glucose. Shortly after they began the manufacture and sale of glucose, respondents adopted and have subsequently used the Chicago-base-plus-freight pricing system previously described—the same pricing system used by their competitors in the sale of glucose. Respondents became an integral part of this pricing system and have demonstrated this by acting from time to time as a price leader by increasing or decreasing their prices in advance of similar action by their competitors. Under this pricing system all manufacturers of glucose generally, but not invariably, follow an advance in price made by one manufacturer by making a similar advance.

80 (c) Respondents and a majority of their competitors have their manufacturing plants located at points other than Chicago, Illinois, and in adopting the aforesaid pricing plan respondents adopted a system of pricing the use of which requires them to discriminate in price among their customers and which automatically precludes them from selling glucose at prices which make due allowance for cost of delivery. In adopting this pricing system, respondents surrendered the advantage in certain markets which they had as a result of the location of their plant and received a reciprocal surrender from their competitors of the advantages of their respective locations, and thus each was enabled, by the use of the formula stated, to quote delivered prices in all markets identical with the prices of other sellers.

(d) Respondents contend that they discriminate in price pursuant to the aforesaid pricing system only because of the prices of other sellers. The fact that these systematic discriminations do not come within the scope of meeting an equally low price of a competitor may be demonstrated by using any conceivable nondiscriminatory pricing basis as a yardstick by which to measure the prices actually made by respondents, and it thereby becomes obvious, even in the instances where respondents did not initiate a price change but merely matched the prices of other sellers at all locations, that at some such locations respondents necessarily made prices higher than at some other locations, and higher than their prices would have been upon any such nondiscriminatory basis. At such locations respondents

have, in effect, discriminated in price to meet the higher price of a competitor. In addition, in the instances where price changes were initiated by respondents at all destinations pursuant to the Chicago-plus-freight pricing plan and during the continuance of such prices, sales were made by respondents at discriminatory prices which, since they were initiated by respondents could not have been made in good faith to meet an equally low price of a competitor.

(e) The systematic discriminations in price by respondents pursuant to the pricing formula used by them, and by all other glucose manufacturers, whereby respondents are enabled to quote delivered prices at all destinations identical with those of other manufacturers and whereby respondents surrender the advantages of their location and receive a reciprocal surrender from other manufacturers, are obviously discriminations made for the purpose of producing the condition which results—delivered prices which exactly match those of other sellers at each destination. In the circumstances stated, this does not represent competition in price by respondents within the ordinary meaning of the term "competition." On the contrary, the effect of the systematic discriminations in price by respondents resulting from the use of fictitious delivery charges according to the formula stated may be substantially to lessen competition between respondents and their competitors and to injure, prevent, and destroy such competition. For the various reasons heretofore stated, the

82 Commission concludes and therefore finds that respondents' discriminations in price in the sale of glucose pursuant to the pricing system described have not been shown to be lower prices made in good faith to meet an equally low price of a competitor within the meaning of subsection (b) of Section 2 of the Clayton Act, as amended.

(f) The Commission is of the opinion that in order to successfully avail of the defense provided by subsection (b) of Section 2 of the Act, a respondent must show affirmatively that his lower prices were made in good faith to meet an equally low price of a competitor and the Commission is not required to prove that such lower prices were made in bad faith. If it were necessary for the Commission to prove bad faith, appropriate steps would be taken for the consideration of the entire background of the Chicago-base-plus-freight pricing system used by respondents and their competitors, including the final decree issued April 6, 1932, by the United States District Court for the Northern District of Illinois in United States vs. Corn Derivatives Institute, et al., Equity No. 11634 (in which the respondents herein were defendants and consented to the entry of such decree). This decree enjoined the defendants from maintaining or continuing a conspiracy in restraint

of trade and commerce in violation of the Sherman Act, which included the agreed use of Chicago as an arbitrary freight basing point from which to compute and charge freight in addition to the quoted price for the purpose of enabling defendants to maintain oppressive and uniform net delivered prices for various corn products, including corn syrup.

83 Paragraph Seven. (a) Respondents stipulated that they had witnesses who, if called, would testify to the effect that respondents did not originate any of the types of discrimination described in Paragraph Four; that such selling practices existed in the glucose industry when respondents entered it; and that, in engaging in such practices, respondents have merely "met the competition of others where necessary to retain" customers or business.

(b) With regard to the practice described in subparagraph (c) of Paragraph Four, respondents have granted extensions of time for delivery of orders "booked" upon the basis of reports received from brokers or salesmen to the effect that the customer had requested extension of delivery time for the undelivered portion of an order "booked" and had stated that other sellers had granted extensions. Respondents claim that, believing such reports to be true and being fearful of losing the good will of customers, extensions of delivery time have been granted.

(c) With respect to the practice described in subparagraph (d) of Paragraph Four, respondents are aware that brokers or salesmen sometimes report fictitious "bookings," including purported "bookings" for concerns to which respondents have not previously made sales of glucose. In instances of the latter type, the buyer usually fails to give shipping instructions and the "booking" is canceled after 30 days. However, when there has been a further advance in the price of glucose and the difference in price between the "booking" and the new list price is substantial,

84 respondents have received shipping instructions pursuant to such "bookings." It is not usual to secure purchase order forms from buyers, and respondents have had reason to believe that some of such "bookings" were made without the knowledge of the buyer and were therefore fictitious. Nevertheless, respondents have made sales pursuant to such "bookings" while concurrently sales were being made to other purchasers at higher prices.

(d) Concerning the practices described in subparagraph (e) of Paragraph Four, respondents stipulated that they had witnesses who, if called, would testify to the effect that such discriminations have occurred after a price advance when a regular customer has taken all the glucose ordered at the old price, ordered and perhaps received and paid for more glucose at the new and higher price, and then told respondents that another seller had offered a speci-

fied amount of glucose at the price in effect preceding the advance; and respondents, being convinced that they were meeting competition, have repriced their order or prior sale accordingly. In some instances purchasers have, under similar conditions—that is, following a price advance and the fulfilment of orders "booked" with respondents at the old price—informed respondents verbally, without supporting evidence, that other sellers had, without the knowledge of the buyer "booked" orders for him 30 or more days before and were prepared to make delivery at the old and lower price. The buyer then offered respondents the business at
85 the lower price, and respondents, believing such reports to be true, have accepted orders and made sales pursuant thereto at prices lower than they charged to other of their customers in concurrent sales.

(e) As to the practice described in subparagraph (f) of Paragraph Four, respondents stipulated that they had witnesses who, if called, would testify to the effect that sales at discriminatory prices pursuant to tank-car orders taken from tank-wagon buyers, followed by deliveries by tank wagon over a period of several months, have been made on the basis of verbal statements by such buyers to them or their salesmen to the effect that competitors have offered similar treatment, and, believing such reports to be true, respondents have made the sales.

(f) When faced with lower prices sporadically made by another seller to individual buyers, a seller has several means of recourse available to him. Respondents in this proceeding elected to grant discriminatory prices to some purchasers upon an individual basis and to defend them under the provisions of subsection (b) of Section 2 of the statute. In such circumstances they should be prepared to fully comply with the statutory provisions. The pertinent provision of the statute is that a seller may rebut a prima facie case of price discrimination by "showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *." There may be circumstances under which a seller cannot conclusively determine at the time or later definitely show that he in fact met a lower price.
86 The statue does not impose an impossible burden upon the seller, but in the opinion of the Commission, in the absence of conclusive proof, it does require that a seller affirmatively show that he did not lightly grant discriminatory prices but first diligently sought, by means reasonably within his command, to determine whether or not in granting a lower price he would in fact be meeting an equally low price of a competitor. The existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would be meeting an equally low price of a competitor should be shown, as well as the

exercise of diligence to ascertain such facts. In appropriate instances this might include the seller's previous experience with or knowledge of the buyer's character and reliability. It is common knowledge that buyers seek to secure the most advantageous prices and terms of sale possible, and reliance by a seller upon representations of buyers concerning offers by other sellers should be tempered by this knowledge.

(g) The showing actually made by respondents in this proceeding indicates that they readily granted discriminatory prices upon unsupported verbal statements of buyers made to them or their salesmen or brokers. It does not appear that respondents made any effort to verify the existence of a lower price by other sellers. There is no showing of substantial reasons respondents had for believing the unsupported representations said to have been made by buyers, and the bare assertion of belief merely purports to reflect a condition in the seller's mind which cannot
87 be appraised unless the reasons for such belief appear. In fact, in some instances respondents have granted discriminatory prices in circumstances which strongly suggested that the buyers' claims were without merit. There is no general showing that respondents sought to so conduct their business as to prevent unwarranted discriminations in price.

(h) The Commission concludes that respondents have failed to establish affirmatively that the discriminatory prices granted by them through variations of the "booking" practice were made in good faith to meet an equally low price of a competitor within the meaning of subsection (b) of Section 2 of the statute, and therefore so finds.

Paragraph Eight: (a) The Commission has hereinbefore found that the effects upon competition in the line of commerce in which respondents are engaged of the systematic discriminations in price made by respondents pursuant to the pricing formula used by them for the purpose and with the effect of producing and maintaining delivered prices at all destinations identical with those of their competitors may be substantially to lessen competition and tend to create a monopoly in the manufacture, sale, and distribution of glucose and to injure, destroy, or prevent competition with respondents who grant and exact such discriminations. In considering the effects of such discriminations, and those resulting from the "booking" practice, upon competition in the manufacture, sale, and distribution of candies and table syrups containing substantial proportions of glucose, attention
88 has also been given to the general facts appearing in the record, including those hereinafter specifically stated.

(b) During the period for which figures are available (June 19, 1936, to December 5, 1939), the Chicago base price of 43° glucose

ranged between $3.59 and $2.09 per hundred pounds. The maximum discrimination in price resulting from the "booking" practice as shown by the record is 55 cents per hundred pounds. This resulted in some purchasers paying respondents from approximately 15 to 25 percent more than competing purchasers concurrently paid for a raw material which constituted a substantial and frequently a major part of the total raw material costs of both the favored and nonfavored customers. These percentage figures would be proportionally less when the "booking" discrimination amounted to less than 55 cents per hundred pounds, but they would also be increased above those figures in those instances where the "booking" discrimination was supplemented by discriminations resulting from the pricing formula. Examples indicating the amounts of the discriminations due to the pricing formula appear in subparagraph (c) of Paragraph Three. The benefits of "booking" discriminations are more usually and generally received by the large purchasers of glucose, with the result that in many instances small buyers pay the new and higher price long before the buyers who purchase in large quantities are required to pay such increased price. When there has been a series of price advances the
89 resulting difference in price between small and large buyers may be as much as 30, 40, or 50 cents per hundredweight. Candies and table syrup containing large proportions of glucose are sold at but a few cents per pound. In the case of such candies, a price difference of $\frac{1}{8}$ cent per pound will divert business; and in the case of table syrup, a difference of $\frac{1}{12}$ cent per pound is sufficient to accomplish that result; and in both cases inability or refusal to meet a lower price offered by a competitor results in a candy manufacturer or syrup mixer being precluded from selling to large buyers of his product. In the event sales are made at competitive prices by a nonfavored candy manufacturer or syrup mixer customer of respondents, it is obvious that his product is less by the amount he is discriminated against than if he had not been discriminated against. It is apparent from the record that candy manufacturers and syrup mixers must sell their products in a closely competitive market in which a very small price difference is controlling. Under such conditions, reason requires the conclusion that the nonfavored purchasers cannot pay prices ranging up to and sometimes exceeding 25 percent more for their principal raw material than favored purchasers with whom they must compete pay, without seriously and injuriously affecting their ability successfully to compete with such favored customers. There are no other or different facts in the record which would support any other conclusion.

(c) The Clayton Act as amended makes discriminations in price unlawful, with certain exceptions not pertinent here, where
90 the effect "may be substantially to lessen competition or tend

to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." In the opinion of the Commission, the words "may be" as used in the statute require a showing of more than a bare possibility of competitive effects specified; but, on the other hand, absolute certainty is not required. A showing of a dangerous probability of competitive effects described in the statute is believed to be sufficient. There is no yardstick by which the effects of discriminations in price upon competition may be quantitatively measured, and any effort in that direction can only end in futile speculation. The Commission believes that the record in this proceeding discloses arbitrary and inherently unfair discriminations in price which, if persisted in or multiplied, have even more than a dangerous probability of the competitive consequences denounced in the statute and which contravene its broad purpose "to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by honest desire for gain." The Commission, is, therefore, of the opinion that the requirements of the statute have been satisfied.

(d) Supplementing the finding stated in (a) above, the Commission concludes and therefore finds that the effects of the discriminations in price granted and exacted by respondents, those which result from the pricing system and those which result
91 from the "booking" practice, may be substantially to lessen competition and tend to create a monopoly in the manufacture, sale, and distribution of candy and mixed table syrups containing glucose in substantial proportions, and to injure, destroy, and prevent competition with the grantors and recipients of the benefits of such discriminations.

(e) Respondents have not shown that the discriminations in price granted by them are within any of the excepting provisions of the statute.

(f) In reaching its ultimate conclusion, the Commission has given consideration to respondents' contention that Section 2 of the Clayton Act as amended cannot be invoked against the discriminations resulting from their Chicago-base-price-plus-freight pricing system because the legislative history of the amending act of June 19, 1936 (Robinson-Patman Act), is said to show that Congress did not intend that it should prohibit the use of a basing-point system of pricing. The Commission rejects these contentions as being without merit. To claim that because discriminations in price are made according to a particular pattern they are thereby immune is to contradict the plain words and meaning of the statute and to attribute to Congress the contradictory intentions of prohibiting and concurrently legalizing the same discriminations in

price. The statute does not either prohibit or grant immunity to discriminations in price merely because they are made according to a certain pattern. No such measure for determining the legality of price discriminations is contained in the statute. The
92 standard actually provided is whether or not the discriminations have prescribed effects upon competition and are or are not within specific exceptions set out in the statute.

CONCLUSION

The aforesaid discriminations in price by respondents constitute violations of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act).

By the Commission.

EWIN L. DAVIS, *Acting Chairman.*

Dated this 13th day of September A. D. 1943.

Attest:

OTIS B. JOHNSON, *Secretary.*

96 In The United States Circuit Court of Appeals for the Seventh Circuit.

[Title omitted.]

Motion to dismiss and strike modified findings as to the facts and conclusion

Filed Sept. 30, 1943

A. E. Staley Manufacturing Company, a corporation, and Staley Sales Corporation, a corporation, Petitioners, respectfully move the Court to dismiss and strike the Modified Findings as to the Facts and Conclusion heretofore filed herein by the respondent, Federal Trade Commission, on the 20th day of September, 1943, and in support of their motion petitioners represent:

1. That the Modified Findings as to the Facts and Conclusion fail to disclose any ground for further action by this Court.

2. That the Modified Findings as to the Facts and Conclusion do not describe or set forth any facts as evidence of acts on the part of petitioners of price discriminations which substantially lessen competition or promote monopoly.

3. That the Modified Findings as to the Facts and Conclusion are the same as the Findings as to the Facts and Conclusion

originally found by the respondent, except that the Modified Findings as to the Facts and Conclusion are supplemented by argument.

4. That no additional evidence has been presented in this case and that the Modified Findings as to the Facts and Conclusion are based upon the identical evidence upon which the Findings as to the Facts and Conclusion were based; that this Court, in its opinion of May 10, 1943, found that there was no evidence in the record to support a finding that petitioners were guilty of price discriminations which substantially lessened competition or promoted monopoly.

97 Your petitioners respectfully submit that in view of the facts hereinbefore stated the Modified Findings as to the Facts and Conclusion should be dismissed and stricken from the record. Your petitioners request, however, that in the event the Motion of petitioners is not granted that the parties hereto be allowed to file supplemental briefs and that the case be again heard before the Court on oral argument pursuant to the order of the Court.

Respectfully submitted this 1st day of October, 1943.

A. E. STALEY MANUFACTURING COMPANY,
STALEY SALES CORPORATION,
By CHARLES C. LE FORGER,
CARL R. MILLER,
Attorneys for Petitioners.

[Title omitted.]

Notice and proof of service

To FEDERAL TRADE COMMISSION, *Washington, D. C.*

Please take notice that the Motion of Petitioners to Dismiss and Strike Modified Findings as to the Facts and Conclusions, a copy of which is attached hereto and made a part hereof, will be presented to the Honorable Court the 1st day of October, A. D. 1943.

CARL R. MILLER,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
State of Illinois, County of Macon, ss:

Carl R. Miller, being first duly sworn, upon oath deposes and says that he is one of the attorneys for Petitioners in the above entitled cause; that as such attorney he served a copy of the above and foregoing Notice and Proof of Service and Motion to Dismiss and Strike Modified Findings as to the Facts and Conclusions upon Respondent by mailing copies of the same by United States

98 Registered Mail, postage prepaid, in an envelope addressed

to the Federal Trade Commission, Washington, D. C., this 29th day of September A. D. 1943.

CARL R. MILLER.

Subscribed and sworn to before me this 29th day of September A. D. 1943.

M. HUFFMAN, *Notary Public.*

In The United States Circuit Court of Appeals For the Seventh Circuit

[Title omitted.]

Statement in opposition to petitioners' motion to dismiss and strike modified findings as to the facts and conclusion

Filed Oct. 7, 1943

Comes now the Federal Trade Commission, Respondent herein, and by its counsel makes the following statement in opposition to Petitioners' motion (filed October 1, 1943) to dismiss and strike the Commission's modified findings as to the facts and conclusion:

"The modified findings as to the facts to which Petitioners' motion is addressed were prepared and submitted pursuant to the Court's direction and replace the original findings. They are, therefore, not subject to a motion to dismiss and strike and such motion is not in order. The Court has yet to decide whether as a matter of law the order to cease and desist should be sustained, modified, or set aside on the basis of these modified findings and, incidentally, whether there is substantial competent evidence to support the findings as modified. Respondent submits that the findings and record sufficiently show in the terms prescribed by the statute the effect of the price discriminations on competitors and on competition.

99 "Petitioners are in error in stating that except for being supplemented by argument the modified findings as to the facts are the same as originally made. The new findings embody important changes, among which are the following:

"1. In accordance with the Court's direction the facts are now set forth 'with more clarity' showing that the effect of the discriminations in price upon competition and upon competitors 'may be' that specified in the statute. Since the statute does not require that competition shall have been actually lessened but only that such 'may be' the result or that there be a tendency to create monopoly, further hearings and additional evidence were not considered necessary.

"2. The amount and character of the discriminations in delivered prices as well as their lack of due allowance for differences in cost of delivery are more clearly shown.

"3. The facts relied upon by Petitioners to establish good faith to meet the equally low prices of competitors are set forth in detail and the reasons are now stated why such facts fail to establish such good faith. This is pursuant to the Court's direction remanding the case 'for consideration of the defense urged by the petitioners and for findings in relation thereto.

"4. The Commission has now stated its reasons for rejecting Petitioners' contention made both before the Commission and the Court that Congress has legalized a certain form of price discrimination that does not make due allowance for differences in cost of delivery and which flows from Petitioners' use of the so-called basing point system."

For the above reasons Respondent submits that Petitioners' motion to dismiss and to strike the modified findings of fact and conclusion should be denied. Conditioned upon the denial of Petitioners' motion Respondent joins in Petitioners' request "that the parties hereto be allowed to file supplemental briefs and that the case be again heard before the Court on oral argument pursuant to the order of the Court."

Respectfully submitted.

FEDERAL TRADE COMMISSION,
W. T. KELLEY,
W. T. Kelley,
Chief Counsel.
WALTER B. WOODEN,
Walter B. Wooden,
Assistant Chief Counsel.

WASHINGTON, D. C., *October 5, 1943.*

100 In United States Circuit Court of Appeals

[Title omitted.]

Order overruling motion to strike

Dec. 6, 1943

It is ordered by the Court that the petitioner's motion to strike respondent's modified findings of fact is overruled.

It is furthed ordered that the parties shall file briefs herein on the modified findings of fact and that this matter be set for oral argument.

In the United States Circuit Court of Appeals for the Seventh Circuit

October Term, 1943, April Session, 1944

No. 8072

A. E. STALEY MANUFACTURING COMPANY, A CORPORATION, AND STALEY SALES CORPORATION, A CORPORATION, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the Federal Trade Commission

Before EVANS, MAJOR, and MINTON, Circuit Judges

Opinion

Filed July 6, 1944

MINTON, Circuit Judge. The Federal Trade Commission filed a complaint against the A. E. Staley Manufacturing Com-
101 pany and the Staley Sales Corporation charging them with a violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 USCA § 13 (a).[1] The Commission claimed that the discriminations which the petitioners practiced in violation of the above statute arose from the Staley companies' practices of applying the basing point system in formulating their prices and of permitting favored customers unfair use of the so-called "booking" privileges. The Commission found that there were discriminations and that such discriminations "have resulted, and do result, in substantial injury to competition among purchasers of glucose * * *." The Commission ordered the companies to cease and desist from the use of these practices. The companies filed their petition before us to review the order of the Commission and the Commission cross-petitioned for enforcement.

On such petition for review and the cross-petition for enforcement, this matter was before us at the April Session in 1943. On May 10, 1943, we held the complaint to be sufficient but remanded

[1] "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce * * *."

the cause to the Commission for "further consideration and hearings if necessary, in order to show with more clarity, if the Commission can, wherein the discriminations occur and how they substantially lessen competition and promote monopoly, and for proper findings thereon; and for consideration of the defense urged by the petitioners, and for findings in relation thereto." Upon the remand, the Commission did not hear any additional evidence. It merely restated its findings of fact which were, for the most part, twenty-seven pages of argumentative dissertations in support of the Commission's thesis. The so-called findings of fact had to be sifted to find what the facts found were. The Commission again found that there was discrimination and that the effect of such discrimination "may be substantially to lessen competition or tend to create a monopoly," and left the order to cease and desist as originally entered. The matter is now before us for disposition after this remand and reconsideration.

The A. E. Staley Manufacturing Company operates a corn products processing plant at Decatur, Illinois. The Staley Sales Corporation is a wholly-owned subsidiary used for the purpose of marketing the manufactured products of the A. E. Staley Manufacturing Company. Among other things, the petitioners produce and sell in interstate commerce unmixed corn syrup, commonly called glucose. Shipments are usually made in tank
102 cars but not in every instance. All shipments are made from Decatur. The companies' competitors are numerous other corporations who sell and ship similar syrup in interstate commerce. The glucose sold by the companies is used primarily in the manufacture of candy and mixed table syrup. Glucose comprises 5% to 90% of the finished weight of the candies produced and the prices paid for it are a substantial part of the total raw material cost of manufacture, especially in the cheaper lines of candy. Glucose is used in greater proportion in candies which are sold by candy manufacturers at a few cents a pound and on a narrow margin of profit. The margin of profit of such candy manufacturers is so narrow that business may be controlled on a concession of one eighth of a cent a pound. In the mixed table syrup, 85% of the mixture is glucose.

The so-called basing point system consists of taking the price of the commodity in Chicago and adding thereto the freight to the place of destination. As practiced by the petitioners, this was without regard to the fact that none of their shipments were made from Chicago but all were made from Decatur. Thus, a buyer who lived in Decatur, where the companies operate their plant, would pay the Chicago base plus freight from Chicago to Decatur, although the goods had never been in Chicago but were always in Decatur and were there delivered to the purchaser.

The same thing was true on shipments to all other points, such as Kansas City, Dallas, Sioux City, Little Rock, St. Louis, St. Joseph, Missouri, and other cities. Notwithstanding the fact that Decatur is nearer to these cities and that the freight rate from Decatur to them was lower than the rate from Chicago, the purchasers in these cities were charged freight from Chicago, although the goods were shipped from Decatur. The maximum amount of discrimination is between Decatur and Chicago, and sometimes Decatur customers are discriminated against in favor of Chicago customers by as much as 16%. Wherever the actual cost of delivery from Decatur is less than the cost of delivery from Chicago, the companies added the difference to the net prices at Decatur. This is what the Commission designated as "phantom freight," for which the companies did not pay. Discriminations under this practice have resulted at various times in differences as great as:

33½c a hundred between customers at Decatur and Chicago.
27½c a hundred between customers at Kansas City and Chicago.
25½c a hundred between customers at Dallas and Chicago.
24c a hundred between customers at Sioux City and Chicago.
20½c a hundred between customers at Little Rock and Chicago.
20c a hundred between customers at St. Louis and Chicago.
19½c a hundred between customers at St. Joseph, Missouri, and Chicago.
18c a hundred between customers at Shreveport and Chicago.

103 If the freight rate from Decatur were reduced while the rate at Chicago remained the same, the benefit of the freight reduction would be withheld from the customers and be added to the price of the commodity. If the freight from Decatur were increased and the rate from Chicago were increased still more, the price to the purchaser would be raised by the amount of the increase in the Chicago freight rate. If the rate from Decatur were reduced and the rate from Chicago were increased, the customers would not get the benefit of the reduced rate from Decatur but would have to pay the increased rate from Chicago. Such are the discriminations which the Commission found to exist in the application of the basing point principle, as employed by the companies.

The Commission also found that the petitioners' use of the "booking" practice resulted in discriminations which occurred by:

1. Permitting favored customers to take delivery at the old price long after the expiration of the thirty-day period within which all customers were supposed to exercise their option of converting their bookings into actual sales.

2. Converting into sales at the old price bookings made by salesmen without authorization of the customer, in anticipation of the increased price.

3. Selling favored customers at the old price where no bookings were even claimed to have been made and long after the period within which all customers were supposed to have indicated whether they desired to take advantage of the booking privilege.

4. Delivering glucose in tank wagons at old tank car prices plus an additional delivery charge to buyers who had booked glucose for delivery in tank cars, although the buyers had no facilities for tank car delivery, where delivery was made long after a higher tank car price had become effective for other buyers.

The amount of the discriminations against small buyers growing out of the booking practice ranged from 30¢ to 55¢ a hundredweight or from 15% to 25% of the purchase price. These discriminations the Commission found to be such as "may be substantially to lessen competition or tend to create a monopoly * * *."

There was substantial evidence in the record to warrant the findings of the Commission that these basing point and booking practices of the companies were discriminatory. In our opinion of May 10, 1943, we stated that, even though there had been a finding that these discriminations tended substantially to lessen competition or create a monopoly, there was no evidence
404 in the record to support such a finding. On further consideration and study, we think that that statement was unwarranted. A consideration of the stipulation concerning the effect of these practices [2] makes it apparent that there was substantial evidence in the record to support the Commission's finding on this second essential to the cause of action.

However, we do not find it necessary to decide whether or not the so-called basing point system is legal or illegal. The Commission found that as employed by the petitioners, it produced discriminations and these discriminations were such as may be "substantially to lessen competition or tend to create a monopoly * * *." It is clear, therefore, that a prima facie case of unlawful discrimination was made out. These same practices have been condemned as discriminatory in an opinion by us this

[2] It was stipulated that the basing point practice had the following effect on competition among candy manufacturers:

"That the higher prices paid for such syrup by such candy manufacturers located as aforesaid other than in the City of Chicago, Illinois, contribute to a greater or lesser degree in their having higher raw material costs than those candy manufacturers located in Chicago, Illinois, the degree in each instance depending upon the difference in price and the proportion of such syrup used in the candies manufactured;

* * *

"That the lower profits of these candy manufacturers paying higher prices for such syrup diminishes their incentive or desire to compete with those candy manufacturers paying the lower prices for such syrup and may deter potential new candy manufacturers from entering the industry in cities where they would pay the higher syrup costs."

As to the mixed table syrup producers, the stipulation was essentially the same.

day in Corn Products Refining Co. v. Federal Trade Commission. While both cases agree that the pricing under the basing point and booking practices was discriminatory, the companies in the present case present a defense not considered in the Corn Products Refining Co. case.

The companies take the position that notwithstanding that a prima facie case may have been made out, they are entitled under Section 2 (b) of the statute to rebut this prima facie case, if they could, by showing that their "lower price * * * was made in good faith to meet an equally low price of a competitor. * * *" 15 U. S. C. A. § 13 (b).

It is stipulated that the A. E. Staley Manufacturing Company went into business in Decatur, Illinois, in 1920. They soon discovered that they could make as good glucose as their competitors but that its quality was not so superior to competitors' as to command the market and that business could be had only by meeting competitors' prices. The company "sold such syrup at the same delivered prices as were quoted by competitors in the markets and at the destinations set forth" in the evidence. Their chief competitors and the largest corn syrup market in the country were in Chicago. They "found that * * * large factories were manufacturing such syrup and delivering it in Chicago at prices which were lower than those prices then existing in any other market; that the delivered price in such other markets was generally equal to the Chicago delivered price plus the published freight rate on such syrup from Chicago to destination."

105

So, at the time the companies entered the business, their competitors were using the so-called basing point system. The prices they made conformed largely to that system. For the companies to get into the Chicago market under that system, they had to absorb the freight from Decatur to Chicago. The bulk of their business was in the Chicago market and their product was sold at a price to meet competitors' lower price in Chicago.

The petitioners claimed that in order to meet the competitive situation, they adopted the basing point price system in good faith, and later the so-called "booking" practice. The Commission found, however, that the companies "have not shown that the discriminations in price granted by them are within any of the excepting provisions of the statute." The Commission seeks to support this finding upon the following stipulation:

"That on several occasions, and since June 19, 1936, Respondents have increased and reduced their price per hundredweight for Corn Syrup for delivery in all markets by the same amount per hundredweight without and independent of any similar and prior action by competitors."

We do not think this is substantial evidence or that there is any other substantial evidence in the record to support the Commission's finding. The basing point practice was being used by their competitors when the A. E. Staley Manufacturing Company went into business. The booking practice developed as the business went along. The evidence in support of these facts is stipulated in the record and is not in dispute.

The stipulation above quoted does not say that such increases or reductions of prices were related to the discriminatory practices with which the companies are charged. For aught that appears in that stipulation, such increases and reductions may have had nothing to do with the discriminatory practices of which the companies were found guilty. Certainly one cannot say that the booking practice discriminations were shown to be related to those independent price changes. Even if it may be inferred that all prices were promulgated by use of the basing-point system so that the price-changing mentioned in the above stipulation should be considered within the basing-point practice, still § 2 (b) of the statute does not require that competitors' prices shall be first announced and promulgated before one may in good faith meet them. The companies may very well have known what the competitive situation in their industry was and what was certain to happen.

In anticipation of what their competitors were certain to do,
106 the companies promulgated prices to meet the foreseen competitive situation.

The fact that the companies were first in the field with a price is not controlling. The question here is: Were they first in the field to use the basing-point-pricing system? It is the use of the system that is complained of. The evidence and stipulations are all to the contrary. The companies' competitors were using the system when the companies entered the field. The companies merely followed the system and practices which had been established by their competitors. That this was done in good faith is not questioned in the evidence.

We think the prima facie case made out by the Commission has been rebutted by the showing made by the companies and, since there is no substantial evidence to the contrary, we would not be warranted in enforcing the Commission's order. The order to cease and desist is vacated and the Commission is ordered to dismiss the complaint.

Dissenting opinion

EVANS, Circuit Judge, dissenting. I agree with the majority opinion when it states that the evidence supports the Commission's finding that the basing-point system as practiced by the A. E. Staley Manufacturing Company was discriminatory and worked to

substantially lessen competition and tended to create a monopoly. Such a finding, supported by substantial evidence, necessitates our accepting it as a verity.

I cannot follow the majority opinion, however, when it holds that the case made out by the Commission was rebutted by the petitioners. We part over the effect of petitioners' effort to bring themselves within the exception found in Subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. A. Sec. 13). That section condemns and makes unlawful discriminations in prices which "may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

The Commission having made a finding supported by substantial evidence and approved by this court that such practice was indulged in, there would be nothing left to this case, were it not for subsection (b) of the same section 13, which places upon the party practicing discrimination the burden of affirmatively showing justification.

The language of the statute, as amended, is — "Nothing contained in Sections 12, 13, 14–21, 22–27, of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of the competitor * * *."

In an effort to determine whether petitioners have established the justification permitted by the statute, it is worthy of note.

107 First, that such justification is limited to cases where the seller is attempting to justify "his lower price." In the instant case there is no attempt to show Staley was trying to justify a lower price. The most that the evidence shows is that Staley attempted to enter the field by complying with the existing basing-point practice. In short, Staley did not want "to stir up the animals" by starting a price war. He accepted the status quo—a status quo which followed a practice which "substantially lessened competition and tended to create a monopoly," and which was, no doubt, satisfactory to one about to enter the field. But the satisfaction was not over the fact that it was to be permitted to "lower prices, but over the fact that said practice tended to lessen competition.

I can find nothing that would justify the conclusion that Staley indulged in its practice to justify a lower price.

Second. Likewise, worthy of note is the requirement of the statutory justification that the seller's "lower price" was to meet an "equally low price" of a competitor. There is nothing to show that the practice was adopted to meet "an equally low price" of a competitor.

If Staley's practice were limited to sales in Chicago, there could be a conceivable case of competition and a price fixing by Staley to meet the competition of Corn Products Company. But there is no showing that Corn Products Company was maintaining a low price. Nor could it be said that the adoption of the basing-point system resulted in either a lower price for the seller or "a low price" of the competitor.

There might be, in my opinion, some justification for saying that Staley adopted the price fixed by the competitors and the competitors' basing-point system in order to prevent a competitive war in the industry which it was about to enter. It continued to maintain that price, not because it was a "lower price" but because the system was profitable and therefore satisfactory to those engaged therein.

Third. Nor can I believe that good faith, as that term is used in the statute, would ever apply to, or justify, a practice by a seller which produced a discrimination of such character as to substantially lessen competition and tend to create a monopoly as here found.

Good faith cannot be ascribed to a seller who adds a freight charge to the selling price when there was no freight charge. It is utterly inconceivable that Staley could charge a customer a price which included a freight item from Chicago to Decatur, when no shipment was ever made by Staley, and delivery was to a customer in Decatur, where Staley's plant is located, and then assert that said practice was to justify a lower price and to meet the equally low price of a (Chicago) competitor.

108 We are here dealing with an attempted legal justification of a practice which substantially lessened competition and tended to create a monopoly. The only justification which the law permits is limited to the instance where the seller lowered its price to meet an equally low price of a competitor. Staley failed to bring itself within the protection of the statute in three respects: (a) Its action was not to justify its "lower price." (b) Its acceptance of the practice was not "to meet an equally low price of a competitor." (c) It was not, and could not be, made "in good faith" when the result of it was to "substantially lessen competition and tended to create a monopoly."

In the concurring-dissenting opinion of Judge Major, it is said, "I agree that the strict literal language of Section 2 (a) makes it appear that the system has been proscribed, but at the same time I am even more certain that it was not the intention or purpose of Congress so to do." In other words, Congress did not mean what it said. The court does not like the language of the statute as written, so rewrites it.

With one part of the above-quoted sentence, to wit, "the strict literal language of Section 2 (a) makes it appear that the system has been proscribed." I agree. We are, in other words, in accord on the proposition that the plus freight charge system is included in that which is proscribed.

What I cannot agree to is that while Congress said so, it did not mean or intend what it said. Nor could I agree that if I were convinced that Congress did not intend what it said, courts could justifiably rewrite a statute to say what the courts believed Congress intended to say. If we were to so construe statutes, the courts, rather than the Congress, would become the lawmaking body.

Courts can and do go far in seeking intent, when the language used is ambiguous or uncertain and there is doubt as to the meaning of words. Courts then study the purpose of the legislation. In the case before us, there is no ambiguity nor uncertainty. And, instead of construing the language to carry out the intent of Congress to prevent unfair trade practices the proposed construction would tie the hands of the F. T. C. and prevent it from performing its duty to keep open all the lanes of commerce to all who wish to use them. It would defeat, or at least handicap, the F. T. C.'s effort to protect the public against practices which the Commission has found (and we approve the finding) "substantially lessened competition" and tended "to create a monopoly."

The purpose of the legislation embodied in the Clayton Act, as amended by the Robinson-Patman Act, is now so clear and obvious that debate or discussion is idle. We are dealing
109 with unfair trade practices. Such condemned practices include those which result in "substantially lessening competition" or which "tend to create a monopoly." Unfair trade methods also include other bad practices, like misrepresentation of quality of goods, false and misleading advertisement, and fraudulent practices in general. In a word, the Act was passed to protect the public against the practices which the avaricious might inflict on an innocent or gullible public. The legislation did not define all the specific kinds of commerce which were subject to its provision. It used all-inclusive language. The only limitation is that

As in the recently decided case of U. S. v. South-Eastern Underwriters Assn., the question is one where Congress has spoken and courts are asked to make an exception to the inclusion of its broad language where no such exception appears in the statute.

In U. S. v. South-Eastern Underwriters Assn. (decided June 1944) the Justices agreed that insurance business was commerce.

Division in the Court occurred over whether that phase of commerce represented by insurance was excepted from the inclusive language of the Sherman Anti-Trust Act. The Court held that the Act covered all commerce and therefore commerce represented by insurance could not be exempted.

In the case before us, we have even stronger reason for concluding that the Congressional Act did not except the practice here under consideration. In the instant case, petitioners must bring themselves within the language of the exception. The fact that one exception is stated in the Act excludes all other exceptions. We are not justified in adding other instances as exceptions. To come within this single exception, petitioners must show that their practices, which tended to lessen competition and to create a monopoly, were justified because they met an unusual situation—in other words, that it was necessary to lower prices—in good faith—to meet equally low prices of a competitor. There is no other exception. Either petitioners come within this exception, or they fail in their defense.

To even contend that such was the justification of the practice in question, strikes me as bordering on the absurd. No lower price by either party was contemplated. Good faith, a term often stretched to the breaking point, has never before been held to sustain a practice which lessened competition and tended to create a monopoly. "Good faith"—a term for the hard-pressed wrongdoer to conjure with, a term which protects the innocent from the consequences of his mistake; also a term behind which the insincere attempt to hide—would be given a false application if it covered the act of those seeking to monopolize an industry.

110 Faced by many a decision, one of which was recently announced by this court (Dietzgen Co. v. Federal Trade Commission, 142 F. 2d. 321), we must hold that action which lessens competition or tends to create a monopoly is unfair within the meaning of the F. T. C. Act, and good faith, as that term is used in the above-quoted exception found in the Robinson-Patman Act, cannot be ascribed to those who indulge in such practice. Such a construction would run counter to the Sherman Anti-Trust Act, the Clayton Act, and the Federal Trade Commission Act. We cannot justifiably hold that by implication the Robinson-Patman Act repealed or changed this Congressional policy so long established. If the change is to be made, Congress, not the courts, must do it.

The order of the Commission should be affirmed and enforced.

Opinion

MAJOR, C. J., concurring in part and dissenting in part.

I concur in the result reached by Judge Minton, that is, that the Commission's petition for enforcement of its order should be denied. Neither do I take issue with the basis for his conclusion that petitioners' price "was made in good faith to meet an equally low price of a competitor" under § 2 (b). However, in my view there is no occasion to decide the merits of such defense for the reason that the Commission has failed to make a case of price discrimination under § 2 (a).

I disagree with the statement, "we do not find it necessary to decide whether or not the so-called basing point system is legal or illegal." In my view, the opinion is a holding that the price system is illegal. Notwithstanding respondent's apparent reluctance to meet this issue head on, it is squarely presented by its cease and desist order. The sole factual situation relied upon to show a "discrimination in price between different purchasers" is that petitioners sold at a delivered price of Chicago plus freight to the point of delivery, irrespective of whether the freight rate from Decatur (the location of petitioners' plant) was greater or less than that from Chicago. I am unable to discern how it can be said in one breath that the legality of such a system is not at issue and in the next that its use is violative of § 2 (a).

It should be kept in mind that respondent's complaint is based solely on an alleged violation of § 2 of the Clayton Act, as amended by the Robinson-Patman Act approved June 19, 1936, and we are therefore not concerned with a case which might be predicated upon some other provision of the anti-trust laws. No contention is made that petitioners were in agreement with their competitors in their adoption of a delivered price system. On this ground alone, much of respondent's argument becomes irrelevant.

The basing point system has been widely employed by industry in this country for more than fifty years (Harvard Law Review 45, page 548, footnote), and notwithstanding respondent's assertion to the contrary, I think a court may and should take judicial notice of a system of such long and extensive use. Furthermore, we may take judicial notice of the fact that various agencies of the federal government by administrative orders and decrees have given recognition to the system. Salt Producers Assn. v. Federal Trade Commission, 134 F. 2d 354, 358; Gay Union Corp., Inc. v. Wallace, 112 F. 2d 192, 195; Benton Harbor, St. J. G. & F. Co. v. Middle West Coal Company, 271 Fed. 216, 218. The Supreme Court in Cement Mfrs. Assn. v. United States, 268 U. S. 588, 598 (decided in 192), said of the system:

111

"There use is rather the natural result of the development of the business within certain defined geographical areas. * * * The basing point is an essential element in making a delivered price, since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement."

Petitioners contend that use of the basing system is not proscribed by § 2, and rely strongly upon the legislative history made at the time of the passage of the Robinson-Patman amendment. On the other hand, respondent contends that the legislative history is irrelevant for the reason that the basing system had no legal standing at any time and the most that can be said from the legislative history is that Congress did not intend to alter its status, that if it was legal before the amendment it was legal afterward, and if illegal before it was likewise illegal afterward. It may be, as respondent contends, that the legality of the system has never been established. Assuming that such is the case, I still think that the Commission carries a heavy burden in attempting to demonstrate that the system has been outlawed, in view of its extensive use in industry over such a long period of time, its recognition by numerous agencies of the government, its limited approval by the Supreme Court, and the emphatic refusal of Congress by express language to outlaw it, although often urged so to do. Furthermore, I am of the view that the legislative history of the instant amendment, together with related proceedings before Congress, amount to an implied recognition of its legality.

I agree that the strict literal language of § 2 (a) makes it appear that the system has been proscribed, but at the same time I am even more certain that it was not the intention or purpose of Congress so to do. I also agree that a superficial view of the system is calculated to lead to its condemnation. If it were within the province of this court to appraise the system, which it is not, we are in a poor position to do so from the record before
112 us. It must be assumed, I think, that it is a two sided question; otherwise, repeated action to outlaw it would not have met with such potent, continued and successful opposition in Congress. Action with reference to a system so thoroughly embedded in the economic life of the country is a matter peculiarly within the legislative domain, and the responsibility should not be assumed by the courts unless compelled to do so by a statutory command which leaves no doubt as to the intention and purpose of Congress.

A mere recitation of the legislative history of the amendment under consideration, together with other pertinent facts relative thereto, leaves no room for doubt but that Congress did not in-

tend to outlaw the basing system; in fact, its purpose to the contrary is clearly shown. Even though a literal reading of the Act as amended may lead to a contrary result, courts are not bound to accept such a meaning if inconsistent with the purpose and intent of its makers. In re Rector, etc., of Holy Trinity Church v. United States, 143 U. S. 457; Takao Ozawa v. United States, 260 U. S. 178, 194.

In the recent important case of United States v. South-Eastern Underwriters' Assn., et al., decided by the Supreme Court, June 5, 1944, the court held that the Sherman Anti-Trust Act was applicable to the defendant insurance companies. Surely it cannot be said that the Sherman Act is any less comprehensive or all inclusive in its terms than the language of the instant Act. Both the majority and minority opinions in that case, however, rely upon the legislative history of the Act. In the majority opinion it is stated:

"But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed. * * * On the contrary, all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any doubt."

If the legislative history may be looked to for a construction of the Sherman Act, I see no reason why it should not be looked to in construing the Clayton Act as amended. In the case last cited, the Supreme Court found nothing in the legislative history of the former Act contrary to its plain unambiguous language, but the congressional history of the latter Act is clearly at variance with the construction sought by respondent.

The Robinson-Patman Act was reported by the House Judiciary Committee as H. R. 8442 of the 74th Congress, and contained the following definition of "price":

113 "(5) The word 'price', as used in this section 2, shall be construed to mean the amount received by the vendor for each commodity unit, after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

The Committee report accompanying the bill expressly stated that the object of this definition was to eliminate the basing point or delivered price method of selling, and that the definition would require the use of f. o. b. method of sale (House Reports, 74th Congress, No. 2287). This definition was stricken by an amendment unanimously agreed to by the House (80 Cong. Rec. 8140, 8224). Representative Patman, one of the authors of the bill, in connection with this amendment conceded on the floor of the House that the anti-basing point provision had been eliminated

from the bill and that it met with his approval. Representative Citron, a member of the House Judiciary Committee in charge of the bill, stated some of the reasons why the basing system should not be outlawed, and among other things said:

"There is an economic justification of this system because it provides an open and above-board method for manufacturers and wholesalers to meet competition outside of their own local freight area. * * * But a more serious consequence of the inclusion of this definition of price, as previously stated, would be to compel all manufacturers to ship f. o. b. shipping point, and therefore compel the very definite localization of operations of all manufacturers and wholesalers, which would have the immediate effect of increasing costs as the result of seriously limited volume production" (80 Cong. Rec. 8224).

Without quoting further, it is sufficient to note that all members who participated in the House debate agreed that the inclusion of the definition of "price" as originally contained in the bill was directed at the basing point price system, and that the elimination of such definition was for the express purpose of removing the basing system from the proscriptions of the amendment. There was not a single discordant note to this view. It is true that some of the members criticized the system, but even those admitted it was a matter which should be given consideration in separate legislation. For instance, one member of the Committee stated, "I think the basing point practice indefensible and we should deal with it soon in a separate bill." When the bill was before the Senate, Senator Borah, in response to an inquiry by Senator Davis as to the effect the proposed legislation would have on the basing point system, stated, "My opinion would be that this does not have any effect upon that. I defer to the judgment of the Senator in charge of the bill, but that would be my impression." Senator Van Nuys, who was in charge of the bill, then stated, "The Senator from Idaho is correct."

114 Notwithstanding this imposing legislative history, respondent argues that it is inconceivable that Congress intended to legalize this "indefensible" practice. To my mind this is a spurious contention. The legislative history leaves no room for doubt but that Congress purposely refrained from outlawing the system and by strong implication gave recognition to its existing legal status.

It is also significant that at the same session of Congress the Wheeler Anti-Basing Point Bill was rejected (80 Cong. Rec. 8102, 8223, and 8224). In 1936, hearings were held before the Senate Committee on Interstate Commerce, from March 9 to April 10, on Senate S. 4055, which was expressly aimed at eliminating the basing point system, and again no legislation resulted. Also,

it may be observed that the Temporary National Economic Committee created by joint resolution of Congress on cerommendation of the President to study the entire problem of monopoly recommended in its final report the legislative destruction of the basing point system as a monopolistic price fixing device. (Senate Document No. 35, 77th Congress, 1st Session, page 33.) It is also interesting to note that the Assistant Chief Counsel for the Commission who argued the instant case before this court, on January 30, 1940, urged the Committee to "consider whether legislation outlawing the basing point system would be recommended." It was his position then that the system could be reached only under "theories of conspiracy and concerted action which are necessary to make the law applicable." (Record of proceedings of T. N. E. C., Vol. 4, page 400.) Cf. Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 352.

All of which shows that not only has Congress refused in no uncertain terms to outlaw the system, but that the Commission has recognized its use as not unlawful except in combination or concerted action. Can it be possible that Congress in the enactment of the Robinson-Patman amendment proscribed the use of the basing system after its clearly expressed intention and purpose to the contrary? I am unwilling to attribute to Congress such a degree of mediocrity. Is it reasonable to suppose that the Commission and its counsel would have continued to urge legislation outlawing the system if such was already an accomplished fact? The plain unvarnished truth is that respondent seeks from this court that which Congress has steadfastly denied.

Respondent relies upon another crutch which furnishes little, if any, support. In 1924, in Federal Trade Commission v. U. S. Steel Corp., et al. (8 F. T. C. decisions 1), it held that the basing point system was illegal under the Clayton Act prior to the passage of the Robinson-Patman amendment. A cease and desist order was issued but, as I understand, no action has been
115 taken by the Commission to enforce its order and the Steel Corporation continues to use this price system or one of the same principle. It is a fair inference in the light of what has since transpired that the Commission entertained no hope that such an order was enforceable under the old Clayton Act, and in view of the legislative history of the Robinson-Patman amendment and other related events, it has little, if any, basis for such hope at this time.

Another factor of some importance is the alternative price system open to petitioners. Of course, I assume it is not within the province of courts or respondent to advise petitioners or anybody else how a business should be operated so as to comply with the law. However, in the instant case, respondent's order re-

quires that petitioners within sixty days file with the Commission a report in writing setting forth "in detail the manner and form in which they have complied with this order." That means, so I would think, that petitioners must advise the Commission of the price system they have adopted in lieu of that which is condemned. Respondent in its reply brief, in response to petitioners' challenge that it describe a price system which would be nondiscriminatory, makes this pertinent suggestion, "But petitioners obviously do not want one pricing method that rather clearly would not be discriminatory, a uniform f. o. b. plant price with exceptions based only on differences in cost." This suggestion no doubt presents the only alternative to the price system now under attack. At any rate, so far as I know, it is the only system which on principle could be distinguished from the basing point system. The f. o. b., or mill price system as it is sometimes called, is the very system which Congress has refused to impose upon industry for the reason that it would cause or tend to cause the centralization of industry in the more highly populated centers. (See Representative Citron's remarks (80 Cong. Rec. 8224).)

This court in its former opinion expressed the view that there was no evidence in the record to support the finding that the discrimination shown tended substantially to lessen competition or to create a monopoly. I am not convinced that we were in error in this respect. In my view, the basing point system has the opposite effect, that is, it has a tendency to preserve competition and prevent monopoly. Especially is this so when compared with the f. o. b. system now sought to be imposed. It was stipulated in effect that the quality of syrup manufactured by petitioners and all competitors was substantially the same, that petitioners could not sell at a higher price than their competitors, and that competitors could not sell at a higher price than petitioners. To me this means that petitioners and their competitors must
116 sell their product at substantially the same price. Petitioners, forced to an f. o. b. price, could not compete with their competitors in the Chicago market any more than their Chicago competitors could compete with them in the area immediately surrounding Decatur. Competition might become a thing of the past, and each manufacturer have a monopoly of the trade in its own area. Other things being equal, and there is nothing in this record to the contrary, such a price system in my judgment would be calculated to lead to a price war from which only the financially strong and those with a favorable geographical location could survive. Such is the unreasonable result which the Commission would have us produce by embracing its construction of the Clayton Act as amended.

I would refuse such construction and leave the matter in the lap of the legislative branch of the government where, in my view, it properly belongs.

A true Copy:
Teste:

_____,

Clerk of the United States Circuit Court,
of Appeals for the Seventh Circuit.

In United States Circuit Court of Appeals

8072

A. E. STALEY MANUFACTURING COMPANY, A CORPORATION, AND STALEY SALES CORPORATION, A CORPORATION, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

On petition to review an order of the Federal Trade Commission

Judgment

July 6, 1944

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Federal Trade Commission entered in this cause on June 10, 1942, be, and the same is hereby, vacated, and the Federal Trade Commission is hereby ordered to dismiss the complaint herein.

117 [Clerk's certificate to foregoing transcript omitted in printing.]

118 Supreme Court of the United States

No. 559, October Term, 1944

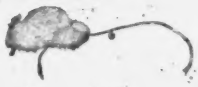
Order allowing certiorari

Filed November 20, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1944



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CITATIONS

612372—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 559

FEDERAL TRADE COMMISSION, PETITIONER

v.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General prays that a writ of certiorari be issued to review a decree of the Circuit Court of Appeals for the Seventh Circuit entered in this cause on July 6, 1944, which vacated an order of the Federal Trade Commission requiring the respondents to cease and desist from making certain discriminations in price between purchasers of glucose.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals on the first hearing before it (R. 58) is reported in 135 F. (2d) 453; its opinion on the second hearing (R. 100) is not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 6, 1944 (R. 116). The jurisdiction

of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether a seller who adopts the inherently discriminatory price system used by his competitors—sale at delivered prices based on Chicago irrespective of actual place of manufacture and shipment—and thus assures that at no place will his delivered price be below the price of his competitors, can justify this price system under the Clayton Act by maintaining that the low price was made in good faith to meet the equally low price of a competitor, within the meaning of Section 2 (b) of the Act.

(2) Whether discriminatory prices granted by a seller, without inquiry into the facts, upon the verbal statements of buyers that competitors were offering like discriminations, were made "in good faith" to meet a competitor's price within the meaning of Section 2 (b).

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

The Federal Trade Commission brought this proceeding pursuant to Section 11 of the Clayton Act charging respondents, a manufacturing concern and its wholly owned marketing subsidiary, with violating Section 2 of that act as amended

by the Robinson-Patman Act of June 19, 1936. The case was heard on stipulated facts (R. 36). After the Commission had made findings of fact (R. 36–45) and had entered a cease and desist order (R. 46–48), the court below, on a petition to review the order, held that essential elements of the charge against respondents were not covered by the findings and remanded the case to the Commission for further findings and for a further hearing if necessary (R. 58–61).

The Commission, on remand, made modified findings of fact of which the following are pertinent.

Respondents manufacture corn syrup, commonly called glucose, at their plant at Decatur, Illinois, all shipments being made from Decatur (R. 68, 70). For many years they have sold glucose strictly on a delivered price basis (R. 69). The lowest price quoted has been the price in Chicago and the delivered price in any other place has been the Chicago price plus the freight rate therefrom to destination (*ibid.*). The freight rates from Decatur and those from Chicago to the same destinations differ and some buyers consequently pay imaginary or "phantom" freight costs while other buyers do not pay in full the actual cost of delivery (R. 70, 72). Taking cost of delivery into account, Chicago purchasers of respondents' product have received a price differential over Decatur purchasers of 33½¢ per hundred pounds and they have received a price differential over

purchasers in certain other cities as follows: Kansas City, 27½¢; Dallas, 25½¢; Sioux City, 24¢; St. Louis, 20¢; Shreveport, 18¢ (R. 71–72).

Glucose is widely used in making candy and it represents a major part of the total cost of manufacturing candies having a relatively high glucose content. It is used in greater proportion in candy sold by the manufacturer at a few cents per pound and on a narrow margin of profit. Frequently such candies are unbranded and a price difference of ⅛¢ per pound is sufficient to divert business from one manufacturer to another. As among the candy manufacturers purchasing glucose from respondents, those who buy at prices discriminating in their favor have a substantial competitive advantage over others and this advantage is particularly marked in the case of respondents' Chicago customers. The result is to diminish the ability and the incentive to compete of candy manufacturers located elsewhere and to promote the concentration in Chicago of manufacture of candy of high glucose content. (R. 75–77.)

Respondents' pricing system produces the same kind of discrimination as between different purchasers of their glucose by producers of table syrups. The cost of glucose is an important factor in the cost of such syrups, which are sold upon such a narrow margin of profit that a difference of as little as 1/12¢ per pound can divert trade from one manufacturer to another. (R. 77.)

When respondents first began to make glucose in 1920, other manufacturers were selling at delivered prices and using Chicago as the basing point for computing their delivered prices. After respondents' product came to be recognized in the trade as equal in quality to that of other manufacturers, they adopted the same pricing system used by their competitors and sold glucose at the same delivered price as other manufacturers.[1] They are unable to sell at prices higher than those of other manufacturers. (R. 78–79.)

On various occasions respondents have increased or reduced their glucose prices in all markets by the same amount prior to and independently of any similar increase or reduction by other sellers of glucose. All manufacturers of glucose generally, but not invariably, follow a price advance made by one manufacturer by making a similar advance. (R. 79.)

All manufacturers of glucose permit any purchaser, within a specified time after announcement of a price advance, to place an order, at the superseded price, for delivery within 30 days. Respondents have allowed certain purchasers, primarily those buying in large quantities, to extend the time of delivery far beyond 30 days and have

[1] Among the other manufacturers is a concern with plants at Chicago and Kansas City, Missouri, and five concerns, each with a single plant, located respectively in Clinton, Iowa; Cedar Rapids, Iowa; St. Louis, Mo.; Granite City, Ill.; and Roby, Ind. (R. 69).

allowed purchase at the prior, lower price although the buyer had not actually placed an order within the specified time. By reason of such "booking" practices, respondents have sold to some buyers at lower prices than they were concurrently charging other buyers. Such price discriminations have sometimes been as much as 55¢ per hundred pounds. (R. 73–75.)

Respondents have not shown that the price discriminations resulting from their system of quoting prices and those resulting from their "booking" practices were made in good faith to meet the equally low price of a competitor (R. 87). The effect of both types of discrimination may be substantially to lessen competition and to prevent competition with those receiving the benefit of the discriminations (R. 90–91).

The court below held that there was substantial support for the Commission's findings as to discrimination and as to its effect, but held that the facts showed that the discriminatory prices were made in good faith to meet the equally low price of a competitor and were therefore within the proviso of Section 2 (b) of the act (R. 103–106). Judge Major, concurring, agreed with this conclusion respecting Section 2 (b) but believed that it was unnecessary to pass on this issue because he was of the opinion that Section 2 (a) does not outlaw price differences which are the product of a delivered price, basing-point system of selling

(R. 110–116). Judge Evans, dissenting, was of the opinion that justification under Section 2 (b) had not been established and that the Commission's order should be affirmed (R. 106–110).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In construing Section 2 (b) of the Clayton Act as permitting justification of price discrimination merely by showing that the seller used the same price system as that employed by his competitors at the time the seller began business.

(2) In holding that price discriminations resulting from adopting the practice of competitors of quoting prices upon a basis which assures that the delivered price of all members of the industry will be identical in any given place, are made "in good faith" to meet the equally low price of a competitor within the meaning of Section 2 (b).

(3) In holding that a discrimination in price can be justified under Section 2 (b) merely by showing that competitors were verbally reported to have given or offered a like price discrimination.

(4) In setting aside the order of the Federal Trade Commission.

REASONS FOR GRANTING THE WRIT

1. This case presents a question as to the meaning of Section 2 (b) of the Clayton Act which is of general importance and which has not been, but

should be, settled by this Court. This case and *Corn Products Refining Co.* v. *Federal Trade Commission,* which was decided by the court below on the same day and which also involves the validity under Section 2 of the Clayton Act of the delivered price system in effect in the glucose industry, are the first judicial decisions dealing with the application of Section 2, as amended by the Robinson-Patman Act, to sales under a delivered price, basing-point system. It is of grave concern to the Federal Trade Commission in its administration of Section 2, as well as of concern to the members of industry, that the questions raised in this case, which led to three opinions in the court below, should be set at rest by decision in this Court.

Section 2 (b) provides that a seller may justify a price discrimination prohibited by Section 2 (a) by showing that his lower price "was made in good faith to meet an equally low price of a competitor." The court below interpreted the section as permitting justification of price discrimination thereunder by showing that competitors sold under the same price *system.*[2] In the court's view, two facts were sufficient to bring respondents within Section 2 (b). One was that the system of quoting delivered prices based exclusively on Chicago was

[2] See the court's statement (R. 106): "The fact that the companies were first in the field with a price is not controlling. The question here is: Were they first in the field to use the basing-point-pricing system?"

being used by their competitors at the time respondents went into business (R. 104–105). The other was that respondents would have to absorb the freight rate from Decatur to Chicago in order to get into the Chicago market under that system (R. 105). The court, in other words, was of the opinion that if respondents' price in *Chicago*, the lowest price which they quoted, was made to meet the equally low price of a competitor, then its entire system of computing prices and the price discriminations resulting therefrom were granted immunity by Section 2 (b). We submit that this interpretation rests on a misconception of the factors which enter into the price discrimination prohibited by the statute and that the court, by reason of this misconception, erroneously interpreted the statutory requirement of "good faith."

A price discrimination, which consists in giving a lower price to one purchaser than to another, is measured by the difference between the higher and the lower price. In the present case it can be assumed that the respondents' prices in Chicago would have to meet the prices of those competitors who had Chicago plants and who therefore did not have to bear any freight charge in selling to purchasers in that city. But if, as was actually the case, respondents' higher prices in Decatur and elsewhere were not dictated by competitive considerations, then respondents' discrimination in price against non-Chicago purchasers, representing the difference between

respondents' Chicago price and their higher prices elsewhere, resulted from the inclusion of fictitious freight in the latter prices, and only to a small and unascertainable degree from meeting the price of competitors in setting the Chicago price. Respondents' price in Decatur, and their prices in all other places to which the freight rate from Decatur was lower than the rate from the plant of any competitor, were noncompetitive prices. In these markets, in which respondents could sell at a lower delivered cost than could competitors (assuming equal production cost), they declined to quote a delivered price below that which their competitors arrived at by basing their delivered prices on Chicago. Respondents refrained from underselling competitors and chose to forego capture of the markets in which they could sell most advantageously and, instead, adhered to a price system which guaranteed that the delivered prices of all members of the industry would be identical in any given market. When selling in this way, neither respondents' Chicago price nor their prices elsewhere were made "in good faith" to meet the prices of competitors—they were made, not to meet the prices of competitors, but to avoid and foreclose all competition in price among members of the industry.

The effect of the decision below is that if all members of an industry follow the same price system, all except the initiator of the system can bring themselves within Section 2 (b) and may

continue the price discriminations which are the product of an inherently discriminatory pricing system. The command of the statute thus becomes essentially unequal in its application. The decision, coupled with that in the *Corn Products* case, leads to the anomalous result that the Corn Products Company is prohibited from discriminating in price by selling at delivered prices computed on a fictitious basing point, but respondents are free thus to discriminate in price. The courts, in construing other provisions of the antitrust laws, have held that the fact that competitors have engaged in the same practices as those with which the defendant is charged is no defense.[3]

2. We submit that the court below substituted its own appraisal of the evidence and of the inferences to be drawn therefrom, in conflict with applicable decisions of this Court.

One of the stipulated facts was that respondents on several occasions increased their price in all markets "without and independent of any similar and prior action by competitors" (R. 29–30). The court below, in holding that this evidence did not support the Commission's finding that respondents' discriminatory prices were not made

[3] *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910, 912 (C. C. A. 2), certiorari denied, 267 U. S. 602 (Clayton Act, Sec. 3); *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 308–309, 312–313 (Federal Trade Commission Act, Sec. 5); *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66, 74–75 (C. C. A. 6), certiorari denied, 229 U. S. 620 (Sherman Act). Cf. *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 599.

to meet competitors' prices, made the following factual inferences for which there was no direct supporting proof (R. 105–106):

> The companies [respondents] may very well have known what the competitive situation in their industry was and what was certain to happen. In anticipation of what their competitors were certain to do, the companies promulgated prices to meet the foreseen competitive situation.

We submit that the court thus departed from the rules laid down by this Court with reference to judicial review of orders of the Federal Trade Commission. In such a proceeding a court is forbidden "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences" (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73) and, when the facts have been stipulated, "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission" (*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63). While these decisions related to orders issued under Section 5 of the Federal Trade Commission Act, the rule is necessarily the same as to orders under Section 2 of the Clayton Act. Section 11 of the Act, which governs review of orders under Section 2, provides, like Section 5 of the Trade Commission Act, that findings of the Commission

which are supported by testimony shall be "conclusive."

3. We also submit that the court below erred in holding that respondents had established justification under Section 2 (b) of the price discriminations granted in connection with the industry's "booking" practices (see *supra*, pp. 6–7). The only evidence relating to competitors was that buyers had made verbal statements, not otherwise supported, as to the action or contemplated action of competitors and that respondents believed the statements to be true (R. 28–29). The decision raises the question whether a discriminatory price granted on the basis of a verbal statement by an interested party, and without inquiry into its accuracy, constitutes a price made in "good faith" to "meet" a competitor's price within the meaning of the statute. The interpretation which the court placed upon Section 2 (b) is not confined to justification of price discriminations of the particular kind here involved. The question of the meaning of the statute, being of general application, merits review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1944.

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INDEX

CITATIONS

627014—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 559

FEDERAL TRADE COMMISSIONER, PETITIONER

v.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals on the first hearing before it (R. 45–48) is reported in 135 F. (2d) 453; the opinions on the second hearing (R. 68–84) are reported in 144 F. (2d) 221.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 6, 1944 (R. 84). Petition for writ of certiorari was filed October 6, 1944, and

was granted November 20, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether respondents, who adopted the discriminatory price system used by their competitors—sale at delivered prices based on Chicago irrespective of actual place of manufacture and shipment—succeeded in justifying their price system under Section 2 (b) of the Clayton Act by their attempt to show that their prices were made in good faith to meet equally low prices of competitors.

(2) Whether respondents, in granting discriminatory prices without inquiry into the facts, upon the unsupported verbal statement of buyers that competitors were offering like discriminations, acted "in good faith" to meet a competitor's price within the meaning of Section 2 (b).

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of com-

modities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in

bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

In this proceeding brought under Section 11 of the Clayton Act, the Federal Trade Commission

charged respondents with discriminating in price between different purchasers of commodities of like grade and quality in violation of Section 2 of that Act as amended by the Robinson-Patman Act of June 19, 1936 (R. 1–4). The case was heard on stipulations and exhibits (R. 27–28). After the Commission had made findings of fact (R. 28–35) and had entered a cease and desist order (R. 36–37) the court below, on a petition to review the order, held that certain essential elements of the charge against respondents were not covered by the findings and remanded the case for further findings and, if necessary, for a further hearing (R. 45–48). The Commission thereafter made modified findings (R. 50–64), of which the following are pertinent:

Respondents manufacture corn syrup, commonly called glucose, at their plant at Decatur, Illinois, all shipments being made from Decatur (R. 50, 51). Their plant has a capacity of about 50,000 bushels of corn per day. For many years they have sold glucose to purchasers strictly on a delivered-price basis, the lowest price quoted being the price in Chicago. Respondents' price at Chicago is not only a delivered price at that place; it is also a base price from which all other delivered prices, including the price at Decatur, are calculated by adding freight from Chicago. (R. 50, 51.) The following table gives the delivered prices charged by respondents at various times and

places for one hundred pounds of 43° glucose in railroad tank-car quantities (R. 51).

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill	$2.94	$3.04	$2.29	$2.09
Decatur, Ill	3.11	3.20	2.47	2.27
Centralia, Ill	3.11	3.20	2.47	2.27
St. Louis, Mo	3.11	3.20	2.47	2.27
Davenport, Iowa	3.11	3.20	2.46	2.27
St. Joseph, Mo	3.32	3.40	2.69	2.49
Kansas City, Mo	3.32	3.40	2.69	2.49
Little Rock, Ark	3.52	3.59	2.89	2.69
Alexandria, La	3.54	3.60	2.90	2.78
Shreveport, La	3.63	3.69	3.00	2.88
Farmersville, Tex	3.68	3.74	3.06	2.86
Dallas, Tex	3.72	3.77	3.09	2.89

Since June, 1936, similar price differentials have existed at all times at places named, and also at other locations, varying according to the varying freight rates to the several destinations (R. 51). Since freight rates from Chicago and those from Decatur to the same destinations differ, the result has been that at some locations buyers pay imaginary or "phantom" freight costs while at other locations they pay only part, or, as at Chicago, none of the actual freight costs. Consequently, while this system of fixing prices generally has made some allowance for the cost of delivery, that allowance has had no relation to the difference in cost of delivery from any place other than Chicago, where neither respondents nor many of their competitors have any plant. (R. 51–52.) As a result respondents have made it a systematic policy to avoid making due allowanee for differences in their actual costs of delivery from Decatur.

The following table shows the price at which actual sales were made by respondents to certain manufacturers of table syrup and candy located in Chicago compared with substantially concurrent sales to certain manufacturers of table syrup and candy located at other points, the difference in delivered prices, the freight rates from Decatur to Chicago and from Decatur to the point of delivery, and the net difference not due to difference in cost of delivery (R. 52–53).

Location of purchaser	Delivered prices	Price difference (freight from Chicago)	Freight rates from Decatur	Delivered prices, less cost of delivery	Net difference not due to cost of delivery
St. Louis, Mo	$3.20	$0.16	$0.10	$3.10	$0.20
Chicago, Ill	3.04		.14	2.90	
St. Louis, Mo	2.15	.06	.11	2.04	.105
Chicago, Ill	2.09		.155	1.935	
St. Louis, Mo	2.16	.07	.11	2.05	.115
Chicago, Ill	2.09		.155	1.935	
Davenport, Ia	3.20	.16	.134	3.066	.166
Chicago, Ill	3.04		.14	2.90	
Davenport, Ia	2.27	.18	.14	2.13	.116
Chicago, Ill	2.09		.155	1.935	
Ottumwa, Ia	2.73	.29	.27	2.46	.17
Chicago, Ill	2.44		.15	2.29	
Ottumwa, Ia	2.39	.30	.27	2.12	.185
Chicago, Ill	2.09		.155	1.935	
Sioux City, Ia	3.50	.46	.36	3.14	.24
Chicago, Ill	3.04		.14	2.90	
St. Joseph, Mo	3.42	.38	.35	3.07	.18
Chicago, Ill	3.04		.15	2.89	
St. Joseph, Mo	3.40	.36	.35	3.05	.15
Chicago, Ill	3.04		.14	2.90	
St. Joseph, Mo	2.49	.40	.36	2.13	.195
Chicago, Ill	2.09		.155	1.935	
Kansas City, Mo	3.50	.46	.325	3.175	.275
Chicago, Ill	3.04		.14	2.90	
Kansas City, Mo	2.49	.40	.36	2.13	.195
Chicago, Ill	2.09		.155	1.935	
Little Rock, Ark	3.63	.59	.535	3.095	.295
Chicago, Ill	3.04		.15	2.89	
Little Rock, Ark	3.59	.55	.50	3.09	.19
Chicago, Ill	3.04		.14	2.90	
Shreveport, La	3.69	.65	.61	3.08	.18
Chicago, Ill	3.04		.14	2.90	
Shreveport, La	2.74	.80	.67	2.07	.085
Chicago, Ill	2.14		.155	1.985	

Location of purchaser	Delivered prices	Price difference (freight from Chicago)	Freight rates from Decatur	Delivered prices, less cost of delivery	Net difference not due to cost of delivery
Shreveport, La	$2.80	$0.61	$0.67	$2.13	$.095
Chicago, Ill	2.19		.155	2.035	
Dallas, Tex	3.77	.73	.73	3.04	.14
Chicago, Ill	3.04		.14	2.90	
Dallas, Tex	3.77	.73	.68	3.09	.19
Chicago, Ill	3.04		.14	2.90	
Dallas, Tex	2.89	.80	.75	2.14	.205
Chicago, Ill	2.09		.155	1.935	
Dallas, Tex	2.94	.85	.78	2.19	.255
Chicago, Ill	2.09		.155	1.935	
Farmersville, Tex	3.01	.77	.72	2.29	.205
Chicago, Ill	2.24		.155	2.085	
Farmersville, Tex	2.96	.77	.72	2.24	.205
Chicago, Ill	2.19		.155	2.035	
Decatur, Ill	2.42	.18	.00	2.42	.335
Chicago, Ill	2.24		.155	[1] 2.085	

[1] In order to put all prices shown in the above table upon a strictly comparable basis, adjustments were made in some instances according to respondents' established scale for differences of specific gravity of glucose and difference in type of customer, but in other instances no adjustments were necessary (R. 53).

After making allowance for the cost of delivery, purchasers of respondents' glucose in Chicago have received a price differential per one hundred pounds over purchasers in other cities as follows (R. 52–53):

Decatur, Illinois	33½¢
Kansas City, Missouri	19½¢ to 27½¢
Dallas, Texas	14¢ to 25½¢
Sioux City, Iowa	24¢
St. Louis, Missouri	10½¢ to 20¢
Little Rock, Arkansas	19¢ to 20½¢

Purchasers in other cities have been subjected to similar price disadvantages (R. 51).

Respondents also discriminate in price in other ways. During a period of from 5 to 10 days after an advance in prices purchasers may "book" at the old price for delivery within 30 days quantities of glucose sufficient to meet their needs dur-

ing that period and thereby secure an option to buy at the lower price. These "bookings" are not firm contracts of purchase, and delivery may or may not be taken at the buyer's option, depending on the subsequent course of the market. This concession applies to all buyers alike but purchasers of large quantities may secure an extension of the time of delivery to 60 or 90 days, and sometimes to 120 days. As a result of such extensions of time granted to favored buyers and not to others, respondents sell glucose to some buyers at a lower price than they concurrently are charging others. (R. 53–54.) Another form of discrimination in price results from the practice of making fictitious bookings after a price advance and later converting these into actual sales. In other instances, without any pretended booking, sales at the old and lower price are made to favored purchasers long after the booking period has expired. Respondents also "book" glucose in tank-car lots to purchasers lacking storage facilities for such a quantity, and, after adding the usual differential, make deliveries in tank-wagon lots over a period of many months, during which they are selling to others at higher prices. (R. 54.) Respondents' stipulated evidence was that these booking practices were engaged in to meet the competition of others who were reported to have granted such differentials in price (R. 21–22); but the evidence conceded that this in-

formation was unsupported except by the verbal statement of the buyer or buyers (R. 22–23), and the Commission found that respondents, having failed to exercise diligence to verify these unsupported statements of buyers who as a class notoriously seek to obtain the most advantageous possible prices, had not sustained the burden of justifying their discriminatory "booked" prices as set in good faith to meet the equally low prices of a competitor. (R. 60–61.)

The price discriminations resulting from the various booking practices described above have amounted to from 5 to 55 cents per hundred pounds (R. 54).

Glucose is used extensively in the manufacture of table syrups and candy. As used by customers of respondents in making table syrup it constitutes about 85% of the finished product and is a large factor in the total cost of such syrup. A syrup mixer may attract customers and divert trade by selling syrup at 5 cents per sixty-pound case less than the price of competitors (R. 54, 56).

In candies, glucose makes up from 5 to 90% of the weight of the product. It is used in the largest proportions in low-priced candies which are sold by the manufacturer at a few cents per pound and on a narrow margin of profit. Frequently such candies are unbranded and a difference of $\frac{1}{8}$ cent per pound, or $12\frac{1}{2}$ cents per one hundred pounds, is sufficient to divert purchases

from one manufacturer to another. This is particularly true of sales to chain stores and to other purchasers who buy in large quantities. (R. 55–56.) Customers of respondents who manufacture candy sell their product in interstate commerce to wholesalers, chain stores and retailers who compete among themselves and with other manufacturers for the available business (R. 55).

The base price for 43° glucose in Chicago ranged from $2.09 to $3.59 per hundred pounds during the period from June 19, 1936 to December 5, 1939. As the discrimination in price resulting from the "booking" practice in some cases was as high as 55 cents per hundred pounds, this practice at times resulted in some purchasers paying respondents from 15 to 25% more than competing purchasers concurrently paid for a raw material which constituted a substantial and frequently a major part of the total raw material cost of such customers. To this, in many cases, should be added discriminations due to the pricing formula which constantly favored purchasers in certain cities over purchasers in other cities. (R. 61–62.) As a result of these discriminations the ability of non-favored purchasers to compete with those who are favored is seriously affected (R. 62). Consequently, the discriminations in price granted by respondents by their pricing and booking systems may substantially lessen competition and tend to create a monopoly in the manufacture,

sale and distribution of candy and table syrups containing glucose in substantial proportions, and to injure, destroy and prevent competition with the grantors and recipients of the benefits of such discriminations (R. 63).

The Commission found pursuant to the stipulated facts that the discriminations reduced the incentive or desire and the ability of candy manufacturers and table syrup mixers in the cities discriminated against to compete with those in the cities having the benefit of the discriminations, and also that such discriminations were sufficient to deter potential competitors in those products from engaging in business at the places discriminated against. (R. 55–56.)

On again coming before the court below the order of the Commission was set aside, Judge Evans dissenting. Three opinions were delivered. Judge Minton took the position that there is substantial evidence in the record to support the finding that the basing-point and booking practices of respondents were discriminatory and tended substantially to lessen competition or create a monopoly, and concluded that the Commission made out a prima facie case of discrimination; but held that inasmuch as the basing-point and the booking systems were in general use in the glucose trade when respondents went into business they adopted these systems in good faith to meet the competitive situation, and he concluded

that this is sufficient to justify the discrimination (R. 68–73). Judge Major concurred in the result, on the ground that the Commission failed to make out a case of unlawful price discrimination and that for that reason there is no occasion to decide the merits of respondents' defense. In his opinion the law did not proscribe the use of the basing-point system (R. 78–84); he did not discuss the booking practices. Judge Evans, dissenting, agreed with Judge Minton that the basing-point system as practiced by Staley was discriminatory and worked to substantially lessen competition and tended to create a monopoly. He was of opinion, however, that respondents had not successfully shown, in defense, that the discrimination resulted from the granting of low prices in good faith to meet the equally low prices of a competitor (R. 73–77).

SUMMARY OF ARGUMENT

1. The court below recognized that respondents' use of a basing-point system of delivered prices is discriminatory, since the delivered prices include fictitious freight from Chicago and hence reflect differences which are not related to differences in cost of transportation. In holding, however, that the discrimination was justified under Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act, the court erroneously applied to the facts of this case the statutory proviso dealing with prices established

in good faith to meet the equally low price of a competitor. Respondents' system of delivered prices based on Chicago was established to produce delivered prices identical with those of competitors, who also used that system. In the great majority of destinations disclosed by the record, respondents in Decatur had a freight advantage over their competitors in Chicago, and hence in basing their prices on Chicago respondents were discriminating in order to meet the equally high delivered prices of competitors. Moreover, on various occasions, changes have been initiated in respondents' prices independently of changes by competitors. Also, respondents' prices have been increased with increases in freight rates from Chicago, while the freight rates from Decatur decreased. All the evidence taken together amply supports the Commission's finding that respondents' discriminatory prices were not the result of the establishment in good faith of a low price to meet the equally low price of a competitor, within Section 2(b) of the Act.

The legislative history of the proviso in Section 2 (b) indicates that it is to be strictly construed and applied. It was adopted as a result of dissatisfaction with the breadth of the corresponding provision in the Clayton Act, which permitted justification where prices were established "to meet competition".

2. The so-called booking practices of respondents discriminate in favor of certain purchasers,

generally the larger buyers, who are permitted to purchase at former prices after a price advance is made. Respondents' evidence to justify this discrimination consisted of a statement that such price advantages were granted when reports came to respondents from salesmen or buyers that competing producers were granting similar price advantages. Admittedly, these reports were uncorroborated, and respondents made no inquiry to verify the reports and offered no evidence supporting their trustworthiness. Apart from the issue whether respondents could justifiably discriminate to meet illegal price discriminations of competitors, the evidence itself was properly found by the Commission not to sustain the burden of proof resting on respondents to show that their action was taken in good faith within the meaning of Section 2 (b). The court below erred in substituting its appraisal of the evidence and its criterion of good faith for that of the Commission.

ARGUMENT

RESPONDENTS HAVE NOT SHOWN THAT THEIR PRICE DISCRIMINATIONS, WHETHER RESULTING FROM THEIR BASING-POINT PRICE SYSTEM OR FROM THEIR BOOKING PRACTICES, WERE MADE IN GOOD FAITH TO MEET EQUALLY LOW PRICES OF COMPETITORS

1. INTRODUCTORY

The court below held that there was substantial evidence to support the finding of the Commission that respondents discriminated in price between

different purchasers by using a basing-point price system and by engaging in so-called booking practices. The court also sustained the Commission's finding that these discriminations were such as may substantially lessen competition or tend to create a monopoly. The only question presented by the petition in this Court is whether the respondents succeeded, as the court below held, in rebutting the prima facie case made by the Commission within the proviso of Section 2 (b) of the Clayton Act, *supra,* p. 4, as amended by the Robinson-Patman Act, that "nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *." As respondents stated in their brief in opposition to certiorari (pp. 6–7): "The question of whether or not the prices of Respondents were made in good faith to meet the equally low prices of competitors is the only question involved in this case."

2. RESPONDENTS' USE OF A BASING-POINT SYSTEM OF DELIVERED PRICES

The price system employed by respondents is, as has been stated, inherently discriminatory, since it is a system of delivered prices for goods manufactured in and shipped from Decatur, Illinois, whereby the delivered prices are determined by taking a Chicago price and adding

the equivalent of freight from Chicago to destination, thus creating a series of differences in delivered prices in different localities which are not due to differences in cost of delivery. Respondents have systematically withheld due allowance for differences in cost of delivery from their plants located at places other than Chicago and have translated such action into varying net prices f. o. b. plant—prices which constitute a pattern of systematic discrimination. The discriminatory price disadvantage to which this system subjects purchasers in cities to which freight rates are less from Decatur than Chicago has been shown *supra*, pp. 7–8.

In attempting to justify this discrimination, respondents introduced evidence, by stipulation, describing briefly the history of their pricing system. That evidence, it is submitted, far from justifying the practice as one adopted in good faith to meet the equally low price of a competitor, discloses that the practice was adopted for very different reasons. This evidence recited that in 1920, when respondents first produced and endeavored to sell corn syrup they found that syrup manufactured by competitors "was being sold at delivered prices in the various markets of the United States; that * * * in Chicago two large factories were manufacturing such syrup and delivering it in Chicago at prices lower than prices then existing in any other market; that the delivered price in such other markets was generally equal to the

Chicago price plus the published freight rate on such syrup from Chicago to destination." (R. 18.) This evidence merely shows that when respondents entered the industry they found in operation a pricing system which, if followed, must inevitably produce exact identity in prices of glucose of the several producers when sold in any city of the United States.

At first respondents' product was unknown and could not be sold at the market price, and therefore they made their sales "by first quoting the same prices as were quoted by competitors and then making whatever reduction in price * * * was necessary to obtain business" (R. 18). This evidence shows that from the beginning respondents attempted to sell at prices necessarily discriminatory and, whenever they failed, sold at lower prices, apparently also discriminatory within the concept of the Clayton Act as amended. As soon as respondents found that their product would command the market price they "adopted the practice of selling at the same delivered prices as [their] competitors, whatever they might be," and have followed that practice since June 19, 1936 (R. 18).

There is nothing in this evidence to indicate that respondents were driven to adopting an inherently discriminatory pricing system in order to meet equally low prices of competitors. In 20 out of the 25 examples of discrimination between

various cities as shown in the table appearing on pages 7–8, *supra,* respondents had a freight advantage over their competitors in Chicago. (Compare the second and third columns of figures, representing freight from Chicago and Decatur, respectively.) In all such cases, therefore, respondents were discriminating in order to meet (or match) the equally high delivered prices that were calculated on a Chicago basis and were discriminating by the precise amount necessary to meet (or match) such prices. Respondents did this by including in their delivered prices the exact amount of "phantom" freight by which their actual freight from Decatur was less than the imputed freight from Chicago. In only 4 of the comparisons did Chicago have a lower cost of delivery than Decatur and in one instance the costs were the same.

The fact is that respondents are seeking to justify an entire discriminatory pricing system by reason of the fact that their price in Chicago, the lowest price which they quoted, had to meet the prices of those competitors who operated Chicago plants and who therefore did not have to bear any freight charge in selling to purchasers in that city. But it can with greater accuracy be stated that respondents' price system was adopted to meet not the lower price of competitors in Chicago but the higher price of competitors in Decatur and in all the important cities

where the freight rate from Decatur is lower than the rate from the plant of any Chicago competitor. A price discrimination is measured by the higher price to one purchaser and the lower price to another.[2] If, as was actually the case, respondents' higher prices in Decatur and elsewhere were not dictated by the lower delivered prices and lower costs of delivery of competitors, then respondents' discrimination in price against non-Chicago purchasers, representing the difference between respondents' Chicago price and their higher prices elsewhere, resulted from the inclusion of fictitious freight in the latter prices, and only to a small and unascertainable degree from meeting the price of competitors in Chicago. In all the markets in which respondents could sell at a lower delivered cost than could competitors (assuming equal production cost), they declined to quote a delivered price below that which their competitors arrived at by basing their delivered prices on Chicago. Respondents refrained from underselling competitors and chose to forego any attempt to capture the markets in which they could sell most advantageously and, instead, ad-

[2] Cf. Fetter, *The Masquerade of Monopoly* (1931), 384: "Discrimination involves a relationship. It is any difference between two compared prices, one higher than the other, and at the same time, *vice versa*, one lower than the other. The higher and the lower prices as between buyers are both alike discriminatory. Any act of discrimination may logically be viewed from either standpoint, and the factor of 'good faith' must be determined in each case by the relation of each price to the other."

hered to a price system which guaranteed that their delivered prices and those of other members of the industry would be identical in any given market. When selling in this way, neither respondents' Chicago price nor their prices elsewhere could be made "in good faith" to meet the prices of competitors, for they were made, not to meet the low prices of competitors, but to avoid and foreclose competition in price with others in the industry.

Other evidence fortifies the Commission's finding that respondents' discriminatory prices were not adopted in good faith to meet the lower prices of a competitor. Changes in respondents' prices have been made independently of changes by competitors. On various occasions since June 19, 1936, respondents have increased or reduced their prices for glucose in all markets prior to and independently of any similar increase or reduction by other sellers of glucose. (R. 23.) This evidence was stipulated and formed the basis for the Commission's finding on the point (R. 57). Nevertheless, the court below ruled that the evidence did not support the Commission's finding, and in reaching this conclusion the court speculated that respondents "may very well have known what the competitive situation in their industry was and what was certain to happen. In anticipation of what their competitors were certain to do, the companies promulgated prices to meet the foreseen competitive situation" (R. 73).

We submit that the court thus departed from the rules laid down by this Court with reference to

judicial review of orders of the Federal Trade Commission. In such a proceeding a court is forbidden "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences" (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73). When the facts have been stipulated, as here, "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission" (*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63).

Other evidence relevant to the issue whether respondents acted in good faith to meet the equally low prices of competitors is found in their response to changes in freight rates. From May 7 to May 17, 1937, the freight rate from Decatur to Dallas, Texas, decreased from 72.76¢ to 68¢ per 100 pounds (R. 26), while the rate from Chicago to Dallas remained unchanged at 73¢ (Comm'n. Ex. 2, fol. p. 24). To avoid discrimination against Dallas buyers, respondents should then have lowered their Dallas price by 4.76¢ per 100 pounds; but, basing their price on Chicago, they made no change in price. (*Ibid.*) Similarly, if the freight rate from Decatur has remained unchanged while that from Chicago increased, respondents have advanced their delivered prices on the basis of the Chicago rate advance. Between August 30 and November 1, 1939, the rate from Decatur to Dallas remained unchanged while the rate from Chicago to Dallas increased 5¢ per 100 pounds. The respondents' delivered price at Dallas was

increased by an equal amount (R. 26; Comm'n. Ex. 2, fol. p. 24). These instances show how artificial is the position of respondents that their discriminatory prices were adopted in good faith in order to meet the equally low price of a competitor.

In holding that a defense had been established under the proviso in Section 2 (b) of the Act, the court below failed to consider the legislative history of that proviso, which indicates that it is to be given a restrictive and not a lax construction. As introduced, neither the House nor the Senate bill contained a provision similar to that in Section 2 of the Clayton Act, which read: "*Provided,* That nothing herein contained shall prevent * * * discrimination in price in the same or different communities made in good faith to meet competition." In the Senate an amendment was adopted incorporating this provision. 80 Cong. Rec. 6426, 6434. In the House the Judiciary Committee reported the bill with a provision substantially like that finally adopted. 80 Cong. Rec. 8139.[3] The conference rejected the Senate version and approved the House provision. The conference report stated (H. Rep. 2951, 74th Cong., 2d sess., pp. 6–7; 80 Cong. Rec. 9414): "This language [of the Senate bill] is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of

[3] A similar provision was also adopted in the Senate in order to bring it before the Conference Committee. 80 Cong. Rec. 6435, 6436.

meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission is included in subsection (b) in the conference text as follows: [quoting the present provision]." It will be seen that the new provision embodies a number of important changes. It is intended as a rule of evidence.[4] It avoids the vague phrase "to meet competition" and substitutes the narrower criterion "to meet an equally low price of a competitor".[5] It evidently does not legalize discriminatory prices which are lowered below, rather than to the level of, those of a competitor.[6] It places emphasis on individual competitive situations rather than on a general system of competition, just as in the main portion of the law the language of the Clayton Act was amended to cover not only discrimination which may "substantially * * * lessen competition" but discrimination which may tend "to injure, destroy, or prevent competition with any person" who grants or receives the benefit of the

[4] See also 80 Cong. Rec. 9903 (statement of Senator Van Nuys in presenting the conference report).

[5] For the vague generality of the former provision, cf. Note, 42 Harv. L. Rev. 680, 684, where it was suggested that "where one distributor, or one type of distributor, markets the product with greater efficiency and thereby better enables the producer to meet the competition of other producers, a discrmination in favor of such distributors might be justified."

[6] See 80 Cong. Rec. 8235 (statement of Congressman Patman in opposing the Senate provision as compared with the House provision).

discrimination.[7] The chairman of the managers on the part of the House, Congressman Utterback, emphasized the narrow scope to be given the proviso. He said (80 Cong. Rec. 9418):

> In connection with the above rule as to burden of proof, it is also provided that a seller may show that his lower price was made in good faith to meet an equally low price of a competitor; or that his furnishing of services or facilities was made in good faith to meet those furnished by a competitor. It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities, and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which

[7] The importance of this emphasis on particular competitive situations, rather than competition in the industry generally, is stressed in Gordon, *Robinson-Patman Anti-Discrimination Act*, 22 A. B. A. J. 593, 594: "The expression, in the third clause, 'to injure, destroy or prevent competition with any person' is wholly new to the anti-trust laws. It is the very heart of the new law and was intended by its sponsors to have a much more drastic meaning than the old. The test apparently may be that of injury to the competitive equality of a single individual—not to competition generally. * * *" See 80 Cong. Rec. 3113 (statement of Senator Logan for Judiciary Committee).

the competition was met lies within the latitude allowed by those limitations.

Congressman Utterback proceeded to deal specifically with the case of discrimination adopted in order to meet an illegal discrimination of a competitor, and he stated that in such a case no absolute defense would be established (*ibid.*):

> This procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.
>
> To illustrate: The House committee hearings showed a discrimination of 15 cents a box granted by Colgate-Palmolive-Peet Co. on sales of soap to the A. & P. chain. Upon a complaint and hearing before the Federal Trade Commission, this proviso would permit the Colgate Co. to show in rebuttal evidence, if such were the fact, an equally low price made by a local soap manufacturer in Des Moines, Iowa, to A. & P.'s retail outlets in that city; but this would not exonerate it from a discrimination granted to A. & P. everywhere, if otherwise in violation of the bill.
>
> But the committee hearings show a similar discount of 15 cents a case granted by Procter & Gamble to the same chain. If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination,

> then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product. One violation of law cannot be permitted to justify another. * * *

This legislative history supports the view that respondents have not established a defense merely by showing that their discriminatory price system was adopted to produce prices everywhere identical with those of competitors. Indeed, the effect of respondents' position, and of the decision below, is that while the system used by competitors is illegal (see also *Corn Products Refining Company* v. *Federal Trade Commission*, decided by the same court, pending on certiorari, No. 680), the system is justified when used by respondents. In construing other provisions of the antitrust laws, the courts have held that the fact that competitors have engaged in the same illegal practices as those with which a defendant is charged is no defense.* The legislative history already discussed suggests that no change in this respect was intended by the proviso in Section 2 (b) as amended.

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* *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910, 912 (C. C. A. 2), certiorari denied, 267 U. S. 602 (Clayton Act, Sec. 3); *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 308–309, 312–313 (Federal Trade Commission Act, Sec. 5); *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66, 74–75 (C. C. A. 6), certiorari denied, 229 U. S. 620 (Sherman Act). Cf. *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 599.

Respondents have argued (Br. in Opp., p. 7) that if they had established their prices by taking their present Decatur price and adding to it the freight from Decatur to destination, the resulting price in each instance would be higher than the price now existing. From this the conclusion is sought to be drawn that "By meeting the lower price of their competitors, respondents were doing only what they were entitled to do under the law." In answer to this contention several observations should be made. In the first place, it is not remarkable that their prices would have been higher under the supposed hypothesis, since the Decatur price which would have been taken as the base includes within it "phantom" freight from Chicago, to which would then be added actual freight from Decatur itself. Secondly, the mere fact that respondents' prices are lower than they might have been under a wholly unrealistic assumption does not constitute a defense to a showing of discrimination in prices as between purchasers in different localities. Thirdly, if we turn to the fact of discrimination itself, as between, for example, purchasers in Chicago where the factory net price is lowest and purchasers elsewhere, including Decatur where the factory net price is highest, we are simply remitted to the conclusion drawn by the Commission, that the discrimination is not in truth due to the establishment of a low Chicago price in good faith to meet an equally low price of competitors there, but is due in substantial

measure to the establishment of artificially discriminatory prices throughout respondents' entire price system.

Indeed, respondents' hypothetical assumption of a system of delivered prices based on the present Decatur price and a reduction everywhere to establish prices identical with those of competitors, reproducing the present system, honeycombed with discrimination, simply exposes the unreality of the attempt to justify the discrimination under the proviso of Section 2 (b).[9] The fallacy becomes all the more striking in view of the legislative history to which reference has been made, which indicates that at most the proviso was designed to permit justification by showing that specific instances of discrimination were caused by an effort in good faith to meet particular instances of lower prices of competitors. The proviso cannot properly be converted into a justification for a fixed pattern of discriminatory prices designed to produce delivered prices identical with those of competitors. Such a system, stemming from a purpose to establish prices equally as high as those of competitors, cannot be justified on the asserted ground that the lower of the discriminatory prices within the system were established in good faith to meet the equally low price of a competitor.

[9] In finding that respondents had not made out their statutory defense that the discriminations were in good faith to meet an equally low price of a competitor, the Commission expressly excluded from its stated grounds the existence of

3. RESPONDENTS' "BOOKING" PRACTICES

Unlike respondents' system of delivered prices based on Chicago, which discriminates between purchasers according to locality, the booking practices discriminate between purchasers on an individual basis, generally according to the size of the purchaser. For a short time after each price advance, respondents allow all buyers within a period of 5 to 10 days the option of purchasing glucose at the old price if delivery be taken within a period of 30 days. Thereafter the period within which delivery may be taken is extended from 30 days to 60, 90 or 120 days in favor of the larger buyers, but generally no corresponding extension is given to the smaller buyers. The result is that the smaller buyers at times pay as much as 55 cents per 100 pounds more for glucose than their larger competitors (R. 53–54). The Commission found, and it could hardly be questioned, that in using these booking practices respondents discriminated in price among their customers, and it found that the effect of this discrimination may be substantially to lessen competition and tend to create a monopoly in the manufacture, sale and distribution of candy and mixed table

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a final consent decree against respondents entered in the United States District Court for the Northern District of Illinois in *United States* v. *Corn Derivatives Institute*, et al., Equity No. 11634 (1932). This decree enjoined respondents and other members of the industry from the agreed use of the basing-point system. (R. 58–59.)

syrups containing glucose in substantial proportions, and to injure, destroy and prevent competition with the grantors and recipients of such discriminations (R. 53, 62–63).

Respondents sought to rebut this proof of discrimination by maintaining that the lower prices were granted in order to meet competition (R. 59–60). The Commission found that this defense had not been established under Section 2 (b) (R. 60–61). A majority of the court overturned the Commission's finding and held that justification was established (R. 68–73).

In addition to the problem of establishing a defense under section 2 (b) by meeting a competitor's price known to be in itself discriminatory (see pp. 25–27, *supra*), the issue here relates to the inferences to be drawn from the stipulated evidence. The following quotations from the evidence on respondents' behalf show how unsubstantial was the testimony on which they relied to justify their action (R. 22–23):

> On several occasions * * * a salesman or broker of the Staley Company has informed us that one or more of our competitors had granted to one or more customers extensions of time within which to take delivery of syrup formerly booked at the older and lower price. * * * *The information * * * was unsupported except by the verbal statement of the buyer or buyers to the salesman or broker.* The

Staley Company, believing such report to be true, has then granted similar extensions * * *.

* * * * *

* * * Subsequent to [an advance in our price] on several occasions candy manufacturers have informed the Staley Company *verbally and without supporting evidence,* that one or more of our competitors had * * * told them that without the knowledge of the buyer an order had been entered * * * for the buyer, and that our * * * competitors were prepared to make delivery at the older and lower price. The buyer offered us the business and the order was accepted. * * *

On several occasions since June 19, 1936, Respondent has received reports from tank wagon buyers that competitors had offered to sell them tank cars of syrup and to deliver such syrup in tank wagon lots at a later time. Such reports came *in the form of verbal statements of the buyer* to Respondent or to salesmen of the Respondent. Respondent believing such reports to be true, has sold such tank wagon buyers tank car lots at the older and lower price subsequent to a price advance * * *. Such deliveries were made for several months subsequent to the price advance. At the time such deliveries were made Respondent has, on some occasions, delivered syrup to competing buyers at the newer and higher price. [Italics supplied.]

Respondents in fact admitted that they made sales under bookings reported by their salesmen although they suspected that "such bookings for customers were made without the knowledge of the buyer * * *" (R. 22).

Under Section 2 (b), in justifying discrimination, a buyer must show that his lower price "was made in good faith".[10] The Commission is not required to prove bad faith. The burden of "rebutting the prima facie case" is upon the person charged with the violation (Section 2 (b)). We submit that the Commission properly held that respondents did not sustain that burden.

The Commission's own appraisal of the evidence shows that it by no means imposed an impossible or unduly burdensome task on respondents in order that the defense under Section 2 (b) might be proved. The Commission stressed the lack of any verifying evidence to support the self-serving assertion that respondents believed that competitors had granted similar discriminations in the particular instances where they were granted by respondents. The Commission pointed out that to rely upon representations made by buyers con-

[10] Good faith has been defined in numerous contexts to require an honest effort to ascertain the facts and the absence of circumstances calculated to put an ordinarily prudent man upon inquiry. *Colket* v. *St. Louis Trust Co.*, 52 F. (2d) 390, 391 (C. C. A. 8); *Siano* v. *Helvering*, 13 F. Supp. 776, 781 (D. N. J.); *Allen* v. *Pioneer-Press Co.*, 40 Minn. 117, 125; *Cochran* v. *Fox Chase Bank*, 209 Pa. 34, 39; *Pinkerton* v. *Bromley*, 119 Mich. 8, 10–11.

cerning offers by competing sellers, without further inquiry, is to ignore the common practice of buyers to bargain for the most advantageous prices and terms of sale. Moreover, the Commission had before it evidence showing that respondents in other connections did not always act in changing prices after similar action by competitors, but on occasion initiated price changes (see p. 21, *supra*). The Commission's discussion of the evidence sufficiently discloses the reasonable basis upon which the Commission found that respondents had not sustained the burden of proving their defense (R. 60–61):

> (f) * * * There may be circumstances under which a seller cannot conclusively determine at the time or later definitely show that he in fact met a lower price. The statute does not impose an impossible burden upon the seller, but in the opinion of the Commission, in the absence of conclusive proof, it does require that a seller affirmatively show that he did not lightly grant discriminatory prices but first diligently sought, by means reasonably within his command, to determine whether or not in granting a lower price he would in fact be meeting an equally low price of a competitor. The existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would be meeting an equally low price of a competitor should be shown, as well as the exercise of diligence to ascertain such

facts. In appropriate instances this might include the seller's previous experience with or knowledge of the buyer's character and reliability. It is common knowledge that buyers seek to secure the most advantageous prices and terms of sale possible, and reliance by a seller upon representations of buyers concerning offers by other sellers should be tempered by this knowledge.

(g) The showing actually made by respondents in this proceeding indicates that they readily granted discriminatory prices upon unsupported verbal statements of buyers made to them or their salesmen or brokers. It does not appear that respondents made any effort to verify the existence of a lower price by other sellers. There is no showing of substantial reasons respondents had for believing the unsupported representations said to have been made by buyers, and the bare assertion of belief merely purports to reflect a condition in the seller's mind which cannot be appraised unless the reasons for such belief appear. In fact, in some instances respondents have granted discriminatory prices in circumstances which strongly suggested that the buyers' claims were without merit. There is no general showing that respondents sought to so conduct their business as to prevent unwarranted discriminations in price.

(h) The Commission concludes that respondents have failed to establish affirmatively that the discriminatory prices

granted by them through variations of the "booking" practice were made in good faith to meet an equally low price of a competitor within the meaning of subsection (b) of Section 2 of the statute, and therefore so finds.

In rejecting the Commission's finding, the decision below is in conflict with the decisions of this Court heretofore cited (*supra*, p. 22), holding that it is for the Commission to appraise the evidence as a whole and, even where the evidence is stipulated, to make the appropriate inferences.

CONCLUSION

For the reasons stated the decision of the court below should be reversed.

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JANUARY 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 559

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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November, 1944.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the Circuit Court of Appeals on the first hearing before it (R. 58-61) is reported in 135 F. (2d) 453. Its opinion on the second hearing (R. 100-116) is reported in 144 F. (2d) 221.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 6, 1944. (R. 116.) The petition for writ of certiorari was filed October 6, 1944. Notice of filing the petition for writ of certiorari was served upon Respondents October 23, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code, as amended.

Question Presented.

Where Respondents' prices were delivered prices determined to meet the prices of competitors, were the prices charged by Respondents made in good faith to meet an equally low price of a competitor?

Statute Involved.

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides:

> (a) It shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. * * *
>
> (f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Statement.

The Federal Trade Commission filed a complaint against Respondents under Section 11 of the Clayton Act as amended charging Respondents with violating Section 2 of that Act as amended. The case was heard on stipulated facts. (R. 15-35.) After the Commission had made findings of fact (R. 35-46) and had entered a cease and desist order (R. 46-48) the Court below, on a petition to review the order, held that the Commission had failed to make a finding covering the essential elements of the cause of action and that there was no evidence to prove in what respect the acts of price discrimination substantially lessen competition or promote monopoly and remanded the case to the Commission for further findings and for further hearing if necessary (R. 58-61).

The Commission held no further hearings, but made and filed in the Court below modified findings as to the facts. (R. 66-92.) In the language of the Court below, the modified findings were for the most part twenty-seven pages of argumentative dissertations in support of the Commission's thesis. The so-called findings of fact had to be sifted to find what the facts found were. (R. 101.)

The Statement in the petition of the Federal Trade Commission refers only to the modified findings of fact and not to the evidence. Some of the references are incomplete or inaccurate. In outlining the facts, we will refer only to the stipulated evidence.

Respondents first manufactured corn syrup in 1920. Syrup manufactured by competitors was being sold at delivered prices in various markets. Two large manufacturers manufacturing corn syrup were located in Chicago and were selling corn syrup in Chicago at prices lower than the prices in any other market. The prices of these com-

petitors in other markets were generally equal to the Chicago delivered price plus the published freight rate from Chicago to destination. (R. 23-24.)

The syrup manufactured by Respondents was not known and Respondents found that buyers were unwilling to pay as much for their corn syrup as for corn syrups with which the buyers were familiar. Respondents' early sales were made by making whatever price reduction was necessary to obtain business. After a short time, Respondents found their corn syrup was well received and that they could sell at the same prices that their competitors were selling. Accordingly, Respondents then adopted the practice of selling at the same delivered prices as their competitors, whatever that might be. (R. 24.)

Respondents have sold corn syrup at the same delivered prices as were quoted by competitors in the markets and at the destinations set forth in Commission's Exhibit No. 1. (R. 24, 31.) No charge was made in the complaint, and there was no evidence of any kind proving or tending to prove, that any such sales were made by Respondents pursuant to any agreement or understanding, express or implied, with any of their competitors.

On several occasions since June 19, 1936, Respondents have increased and reduced their price per hundred weight for corn syrup for delivery in all markets by the same amount per hundred weight without and independent of any similar and prior action by competitors. (R. 29-30.)

The quality of corn syrup manufactured by Respondents and their various competitors is substantially the same. Respondents in no instance have been able to obtain a premium over the general market price charged by competitors, and competitors are not able to obtain a higher market price at any point than that quoted by Respondents in such market. (R. 24-25.)

Corn syrup is used to some extent in the manufacture of candy, constituting from 5 to 30% of the finished weight thereof. Generally corn syrup is used in candies sold by candy manufacturers at a few cents per pound and at narrow margins of profit. Candy manufacturers may attract customers by selling such candies at as little as one-eighth of a cent per pound lower than competitors. (R. 18.)

The higher prices paid for such corn syrup by candy manufacturers located other than in Chicago contribute to a greater or lesser degree in their having higher raw material costs than those manufacturers located in Chicago. (R. 18.)

Candy manufacturers paying higher prices for corn syrup may sell candies at competitive prices only by absorbing the higher syrup costs or by increasing the price of candies. The result in either case is to reduce profit either directly through the absorption of such higher syrup costs or indirectly through reduced volumes of sales. (R. 18.)

The lower profits of candy manufacturers paying higher prices for such syrups diminishes their incentive or desire to compete with those candy manufacturers paying the lower prices for such syrup and may deter potential new candy manufacturers from entering the industry where they would pay the higher sales costs. (R. 18.)

A similar situation exists with reference to syrup mixers. Table syrup is packed sixty pounds to a case, of which approximately fifty pounds is corn syrup. Syrup mixers may attract customers by selling such mixed syrups at five cents per case lower than a competitor. (R. 19.)

Prior to the time Respondents began the manufacture of corn syrup, certain selling methods known as "booking practices" were in existence in the industry. Respondents did not originate or adopt these methods, but they have

met the competition of others where necessary to retain their customers and their business. (R. 27-28.)

The "booking practices" grew out of a long established trade practice in the industry by which, after a price advance, all purchasers of corn syrup have been permitted to purchase at the old price for a specified period of time following the announcement of the price advance. Competitors of Respondents have discriminated between purchasers by extending this period of time to certain purchasers and not to others, and by other similar practices by which certain purchasers of corn syrup have been able to purchase corn syrup at lower prices than other purchasers. (R. 25-29.) The Respondents engaged in the "booking practices" in order to retain their customers and their business. (R. 28.) Respondents engaged in the "booking practices" because they believed the statements of customers that such customers were receiving similar concessions from competitors of Respondents. (R. 28, 29.)

The Court below held that the prima facie case made out by the Commission was rebutted by the showing made by Respondents that the discriminations were in good faith to meet an equally low price of a competitor. (R. 104, 106, 110.)

Argument.

1. The Court below correctly vacated the order of the Federal Trade Commission. The evidence was stipulated and the undisputed facts clearly disclose that the prices of Respondents were delivered prices determined to meet the prices of Respondents' competitors in the various markets. Under Section 2 (b) of the Clayton Act this proof constitutes a sufficient defense to the complaint of the Federal Trade Commission. The question of whether or not the prices of Respondents were made in good faith to meet

the equally low prices of competitors is the only question involved in this case. Contrary to the statement of the Commission in its petition, the question of the legality of the basing point pricing system is not at issue. The Court below in its opinion specifically stated "We do not find it necessary to decide whether or not the so-called basing point system is legal or illegal." (R. 104.)

2. There is nothing "inherently discriminatory" in the basing point pricing system. Obviously a Chicago manufacturer has the right to charge his customers his Chicago price plus freight to destination. When he does that, he is using the basing point pricing system and it cannot be contended that any discrimination could possibly result. If a competitor of the Chicago manufacturer is located in some other city, Decatur, Illinois, for example, his plant price plus freight to destination might be higher or lower than the Chicago manufacturer's price at some or all destinations. Where it is higher, the Decatur manufacturer is certainly entitled under Section 2 (b) of the Act to meet the lower price of the Chicago manufacturer. That is what Respondents did in this case. The evidence is uncontradicted. By adding to the Decatur price for corn syrup shown on Commission's Exhibit No. 1 (R. 31), the freight from Decatur to destination as shown on Respondents' Exhibits No. 1A and 1B (R. 33, 34), it clearly appears that the resulting price in each instance is higher than the prices at which the actual sales were made. By meeting the lower price of their competitors', Respondents were doing only what they were entitled to do under the law.

3. The cases cited at Page 12 of the petition are not in point. They do not involve a provision similar to the section of the Statute here involved. Section 3 of the Clayton Act, Section 5 of the Federal Trade Commission Act and the Sherman Act are not qualified by a provision that a

seller may rebut the "prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by competitor".

4. Likewise, the cases of *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73, and *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63, are not in point. In the Algoma Lumber Co. case, there was substantial evidence in the record supporting the charge of unfair competition and it was upon such substantial evidence that the Federal Trade Commission based its order. In the Paper Trade Association case, this Court held that in determining the effect of certain stipulated facts, the Federal Trade Commission was entitled to take into consideration all of the stipulated facts and the inferences legitimately to be drawn from them.

In the case at bar the only evidence is the stipulation that Respondents determined their prices by meeting the competition of their competitors. There is no contrary evidence nor are there any inferences to be drawn. The evidence was all stipulated and it is not contradictory. There was no evidence to be weighed by the Federal Trade Commission. The Court below simply applied the law to undisputed facts as the Federal Trade Commission had arbitrarily and unreasonably refused to do.

5. The question of whether or not Respondents were entitled to rely upon verbal statements of customers is not involved. Section 2 (b) of the Act simply requires that the action of a seller be in good faith. Again on this point, the evidence is without contradiction. Respondents, believing the statements of their customers (R. 28-29), met the competition of others to retain their customers and their business (R. 27-28). It does not require an inference

to determine that Respondents were in good faith if they believed the statements made to them. Furthermore, persons are presumed to obey the law. Section 2 (f) of the Act makes it unlawful for a buyer to knowingly induce or receive a prohibited discrimination. The record affirmatively shows good faith on the part of Respondents, but were not such evidence available, we submit that Respondents were entitled to presume that their customers would not violate this section of the Act, and upon such presumption were justified in believing the statements made to them by their customers.

6. The case of *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 Fed. 211, referred to at Pages 9 and 12 of the petition has no bearing on this case. The Court below said, "While both cases agree that the pricing under the basing point and booking practices was discriminatory, the companies in the present case present a defense not considered in the Corn Products Refining Co. case". Likewise, in the Corn Products Refining Co. case, the Court referred to the decision of the Court below in this case and said, "The final disposition of that case grew out of the belief of the court that the manufacturer was, under the facts there involved, justified in what it did in the proviso of the Statute exempting the vendor from liability if it proves that the practice complained of is necessary, in good faith, to meet the lower prices of competitors. In other words, the facts were such, in the belief of the majority, as to rebut, as provided by the Act, the prima facie case of violation made by the Commission. No such question is presented to us here, for the present record discloses no such contention and no such rebutting facts."

Conclusion.

Respondents are given no rights or advantage by the decision of the Court below. Under the decision and under the law, they were and are entitled in good faith to meet the equally low price of a competitor.

This case presents no question which requires a review by this Court. The petition should be denied.

Respectfully submitted,

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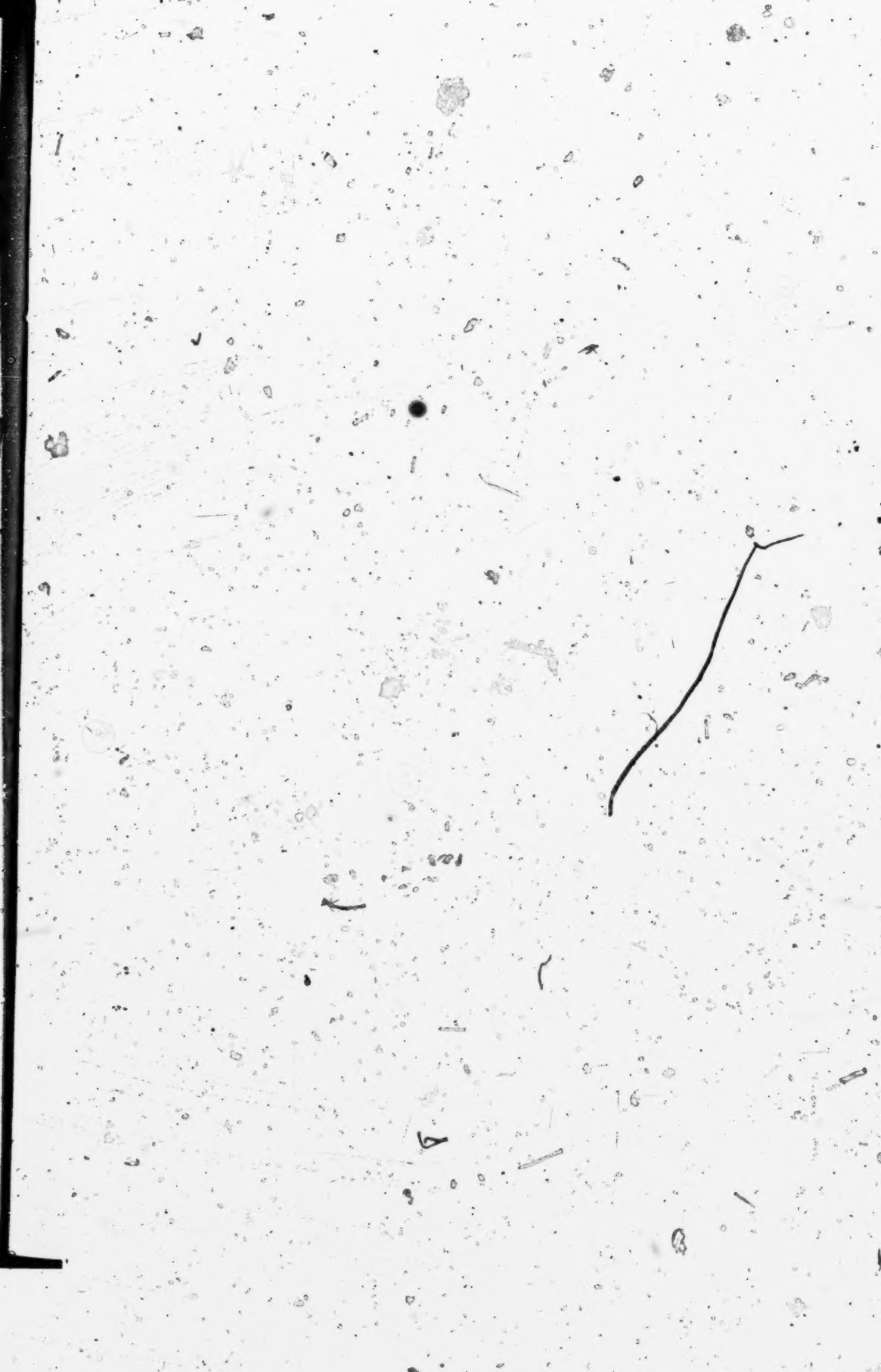
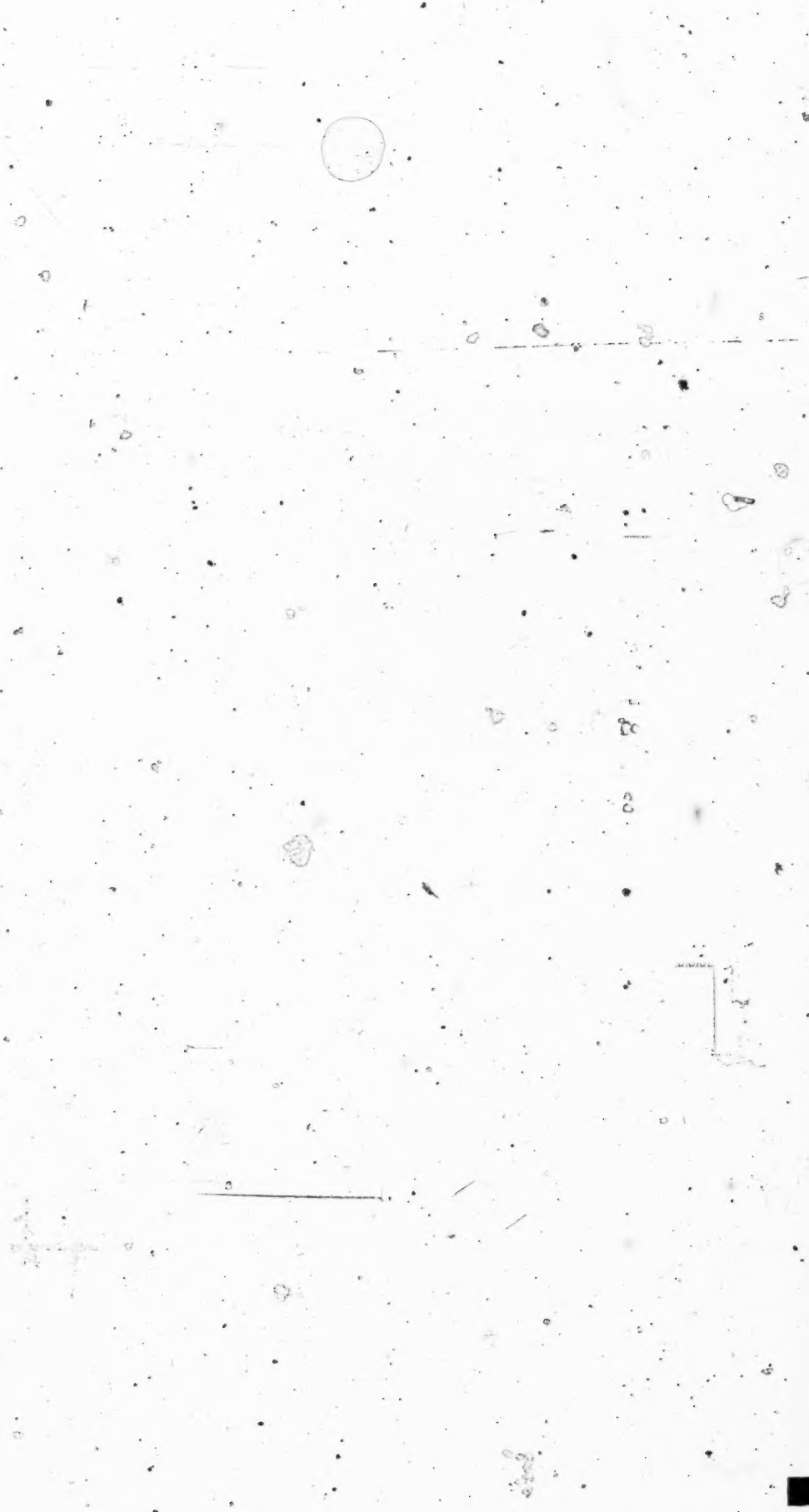
November, 1944.





IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 559

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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Opinion Below.

The opinion of the Circuit Court of Appeals on the first hearing before it (R. 45-48) is reported in 135 F. (2d) 453; the opinions on the second hearing (R. 68-84) are reported in 144 F. (2d) 221.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on July 6, 1944. (R. 84.) Petition for writ of certiorari was filed October 6, 1944, and was granted November 20, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

(1) Is the basing point pricing system unlawful under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act?

(2) Were the prices charged by respondents in good faith to meet the equally low prices of competitors?

Statement.

Instead of referring to the stipulation of facts, which, with the exhibits, constituted the only evidence in this case, petitioner makes reference to the findings of fact of the Federal Trade Commission. These findings of fact include the arbitrary inferences and conclusions of the Federal Trade Commission about which respondents complained in the lower court and which were considered by the lower court in its opinions.

The facts set forth in the stipulation (R. 12-27) are quite different in essential characteristics from the purported facts in the modified findings as to the facts and conclusion. (R. 49-64.)

The evidence offered by petitioner was that certain sales were made to certain purchasers at certain prices, all as shown by Commission's Exhibits 31 and 32. (R. 24.) The petitioner introduced no evidence showing how these prices were fixed or determined.

The evidence offered by respondents, which was uncontradicted by petitioner, was that when respondents first began manufacturing corn syrup in 1920, two large competing factories were then located in Chicago and were selling corn syrup in Chicago at prices lower than prices existing in any other market, and that the delivered prices for corn syrup in such other markets were generally equal to the Chicago delivered price plus published freight rates

on such syrup from Chicago to destination. Buyers were unwilling to pay as much for corn syrup manufactured by respondents as they were for corn syrup with which they were familiar and which was being manufactured by competitors of respondents. In order to make sales, it was, therefore, necessary for respondents to first quote the same prices as were quoted by competitors and then make whatever reduction in price that was necessary to obtain business.

After a short period of time, respondents found that their corn syrup was well received by the trade and that they could sell their corn syrup at the same price that competitors were selling. Accordingly, respondents adopted the practice of selling at the same delivered prices as their competitors, whatever they might be. Since June 19, 1936, respondents have sold such syrup at the same delivered prices as were quoted by competitors. (R. 18.)

At page 5 of its brief, petitioner states: "'Respondents' price at Chicago is not only a delivered price at that place; it is also a base price from which all delivered prices, including the price at Decatur, are calculated by adding freight from Chicago." (R. 51.) The reference is to the findings of fact of the Federal Trade Commission and not to the evidence. There is no evidence in the record to support this statement. The evidence was that certain sales were made at certain prices at Decatur, the site of respondents' plant. The Decatur prices at the respective times were respondents' mill or plant prices. We wish to stress this point at the outset and argue it in detail later because it is upon this false premise that petitioner seeks to build its case.

Respondents sold at the same delivered prices as their competitors. (R. 18.) These prices at markets other than Chicago were equal to the Chicago price plus freight from Chicago to the respective markets. Commission's Exhibits

31 and 32. (R. 24.) However, these prices were lower in every instance than a price determined by adding to respondents' Decatur price, freight from Decatur to destination. Commission's Exhibits 31 and 32 (R. 24), and Respondents' Exhibits 1a and 1b. (R. 25, 26.) This is demonstrated by the table at page 18 of this brief, which table was compiled from the said exhibits.

Judge Minton, in his opinion, said that the Court found it unnecessary to decide whether or not the basing point pricing system is legal or illegal. (R. 71.) However, he did find that such prices were discriminatory. As we point out in the argument, both Judge Minton in his majority opinion, and Judge Evans, in his dissenting opinion, reached this conclusion upon the erroneous assumption that respondents' mill price must be the same as the mill price of respondents' Chicago competitors. In this connection Judge Major, in his opinion concurring with the results reached by Judge Minton in his majority opinion but criticising the reasoning used, said:

> "I disagree with the statement, 'we do not find it necessary to decide whether or not the so-called basing point system is legal or illegal.' In my view the opinion is a holding that the price system is illegal. Notwithstanding respondent's apparent reluctance to meet this issue head on, it is squarely presented by its cease and desist order." (R. 78.)

It was Judge Major's opinion that the basing point pricing system is legal, and that since the evidence discloses only that respondents were using the basing point method of pricing, petitioner had failed to make out a case of price discrimination under Section 2(a) of the Act. (R. 78.)

Judge Minton and Judge Major agreed that respondents' prices were fixed and determined "in good faith to meet an equally low price of a competitor." (R. 73, 78.)

The statement in petitioner's brief relating to "booking

"practices" also refers only to the Federal Trade Commissions' findings of fact and omits essential parts of the stipulated evidence.

The only evidence relating to the "booking practices" was evidence offered by the respondents. (R. 20-23.) This evidence was that for many years the industry had followed long established trade practices by which purchasers of syrup were permitted to purchase at the old price subsequent to a price advance. Competitors have told the trade that their price had been advanced, but that if the buyer would place an order with them at the price existing prior to the advance, it would be accepted. Respondents have been compelled to meet this competition. (R. 20.) The evidence of respondents disclosed four "booking practices" followed in the industry. (R. 20, 21.) Respondents' evidence further established the fact that the selling practices were in existence prior to the time respondents manufactured corn syrup and that they had no alternative except to follow reports of such competition. Respondents did not originate or adopt these abuses, but met the competition of others where necessary to retain their customers. (R. 21, 22.)

(1) Where a salesman or broker informed respondents that one or more competitors had granted a customer an extension of time in which to take delivery of syrup formerly booked at the older and lower price, respondents, "believing such report to be true," then granted similar extensions. (R. 22.)

(2) At the time of a price advance, respondents received from salesmen or brokers notification to enter orders for customers, some of whom respondents had not previously sold. In case of customers not previously sold, the order was usually cancelled some thirty days later because of a refusal of the buyer to give shipping instructions.

However, when there was a further upward change in price, respondents have been given shipping instructions and have made shipment. Respondents "suspect, but do not know," that some such bookings for customers were made without the knowledge of the buyer. (R. 22.)

(3) After a price advance, respondents have been informed by candy manufacturers that one or more competitors had told such candy manufacturers that without the knowledge of such candy manufacturers, orders had been entered in their behalf and that such competitor or competitors were prepared to make delivery at the older and lower price. (R. 22.) "When the customer had convinced respondent that it was meeting competition, respondent agreed to re-price the order to the lower figure." (R. 21.)

(4) Respondents received reports from tank wagon buyers that competitors had offered to sell them tank cars of syrup and to deliver such syrup in tank wagon lots at a later time. "Respondents, believing such reports to be true", sold such wagon buyers tank car lots at the lower and older price subsequent to a price advance and delivered in tank wagon lots. (R. 23.)

Judge Minton and Judge Major agreed that the prices charged by respondents as a result of these "booking practices" were "in good faith to meet an equally low price of a competitor." (R. 73, 78.)

Summary of Argument.

Petitioner contends respondents discriminated in price in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act by (1) the use of the basing point pricing system, and (2) the use of "booking practices".

I.

A. The basing point pricing system is not illegal. It is a long established practice in the industries of this country and has become embedded in the economic life of the country.

B. It is a system that had been in use under the Clayton Act prior to the amendment of that Act by the Robinson-Patman Act. No provision of the Robinson-Patman Act purports to declare the basing point pricing system illegal.

C. The legislative history of the Robinson-Patman Act discloses that it was the clear intent of Congress that the basing point pricing system should not be declared illegal.

D. As a result of using the basing point pricing system, respondents' delivered prices were lower in every case than their f. o. b. Decatur price plus freight to destination. Respondents' prices were, therefore, "made in good faith to meet an equally low price of a competitor."

II.

The evidence relating to the use of "booking practices" was produced solely by respondents. Petitioner did not make out a prima facie case against respondents, but, in any event, respondents' acts in every case were in good faith and were to meet a competitive situation occasioned by what respondents believed to be prior similar acts by respondents' competitors.

ARGUMENT.

The alleged discriminations against which petitioner complains are two: Those resulting from the use of the basing point pricing system and those resulting from the use of "booking practices".

Petitioner assumes that the basing point pricing system is illegal and that the prices resulting from its use are, therefore, necessarily discriminatory. That is the first issue in this case.

I.

The Basing Point Pricing System Is Not Illegal.

A. The "basing point" pricing system has been in general use for many years.

The "basing point" pricing system has been widely employed by industries in this country for more than fifty years. (45 Harvard Law Review 548.) (Werne, "Business and the Robinson-Patman Law," App. 36.) This has been especially true in the case of standardized products such as corn syrup, cast iron pipe, iron and steel, coal, lumber, cement, oil, heavy chemicals, barrels, lime, building materials and many other products. This question was considered by this court twenty years ago in the case of *Cement Manufacturers Protective Association, et al. v. U. S.*, 268 U. S. 588, where the Court said at page 598:

> "The use of basing points * * * is rather the natural result of the development of the business within certain defined geographical areas. * * * If there were no blanket freight rate, the competing mills must still use the rate from a given basing point in order to compete with the mills located in the vicinity of the

chief point of production. In either case, the freight rate from the basing point is an essential element in making a delivered price since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement."

The basing point pricing system has been and is now recognized by many governmental agencies and this Court should take judicial notice of the administrative orders and decrees giving recognition to the system. *Salt Producers Association* v. *Federal Trade Commission*, 134 F. (2d) 354, 358; *Gay Union Corp., Inc.* v. *Wallace*, 112 Fed. (2d) 192, 195; *Benton Harbor St. J. G. & F. Co.* v. *Middle West Coal Co.*, 271 Fed. 216, 218.

The existence of the basing-point pricing system has been recognized and given limited approval on one other occasion by this Court. *Maple Floor Manufacturers Association* v. *U. S.*, 268 U. S. 563. Both this case and *Cement Manufacturers Protective Association, et al.* v. *U. S.*, 268 U. S. 588, were decided in 1925 and prior to the amendment of the Clayton Act by the Robinson-Patman Act.

B. Effect of amendment of Clayton Act by Robinson-Patman Act.

The charges leveled at the respondents under the complaint relate to actions by respondents only since June 19, 1936, the effective date of the Robinson-Patman Act. Inferentially the position of petitioner is that the basing point pricing system is illegal under some provision or provisions of the Clayton Act as amended by the Robinson-Patman Act, although it was not illegal under the Clayton Act prior to the amendment. A comparison of the provisions prior to the amendment of the Act with the provisions of the Act after the amendment discloses no basis for this

position. (App. 27, 28.) The Act as amended contains no reference to basing point pricing and there is no substantial difference in the provisions from which it might be reasonably concluded that the amendment sought to make the basing point pricing system illegal. To find the congressional intent contended by petitioner, it lifts a provision of Section 2 (a) inserted for the benefit of the seller and so distorts its meaning as to apparently serve petitioner's prupose. We refer to the following provision:

> "Provided, that nothing contained * * * shall prevent differentials which make only due allowances for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The difference in the cost of delivery referred to in this provision is not the difference that may arise from the use of the basing point pricing system. As is hereinafter demonstrated, a provision which would have made the basing point pricing system illegal, was stricken from the bill and we submit that the legislative history of the Act as hereinafter discussed, clearly discloses that not only was it not the intention of Congress to make the basing point pricing system illegal, but that Congress' intent was that the basing point pricing system should continue as a legal method of doing business. It is, therefore, only giving meaning to the intent of Congress to say that the reference to the difference in the cost of delivery is to a difference other than a difference that might arise from the use of basing point pricing system. The Federal Trade Commission is limited and restricted in its action by the authority it receives from Congress. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. The Federal Trade Commission evidently shared this opinion as late as January 30, 1940. At that time the Assistant Chief

Counsel for the Commission urged the Temporary National Economic Committee to consider whether legislation outlawing the basing point pricing system should be recommended. It was then his position that the basing point pricing system could be reached only under theories of conspiracy and concerted action. (Rec. of Proceedings T. N. E. C., Vol. 4, Page 400.) No question of conspiracy or concerted action is involved in this case.

C. Legislative history of the Robinson-Patman Act.

An examination of the legislative history of the bill which became the Robinson-Patman Act discloses that when it was reported by the House Judiciary Committee as H. R. 8442 of the 74th Congress, it contained the following definition of "price":

> "(5) The word price, as used in this Section 2 shall be construed to mean the amount received by the vendor for each commodity unit, after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

The report of the committee, which accompanied H. R. 8442 as reported back, stated that the object of the definition was to eliminate the basing point or delivered price method of selling. The committee's report stated that the definition would require the use of f.o.b. method of sale. (House Reports 74th Congress 2287.) This definition was stricken by amendment, unanimously agreed to by the House. (80 Cong. Rec. 8140, 8224.)

Representative Patman, one of the authors of the bill, stated on the floor of the House that the definition of "price" was really an anti-basing point provision and that the Judiciary Committee had requested the chairman to introduce an amendment on the floor striking the provision from the bill. He stated that such action met with his approval. (App. 29, 30.)

Representative Citron, a member of the House Judiciary Committee in charge of the bill, stated at length the reasons why the basing point pricing system should not be made unlawful. (App. 31-34.) Among other things, Representative Citron said that if the price definition remained in the bill, it would result in enforcing f.o.b. shipping prices on manufacturers, in which case such manufacturers would not be able to compete with foreign manufacturers not subject to the provisions of the bill; that to compel all manufacturers to ship f.o.b. shipping point would compel the very definite localization of operations of all manufacturers and wholesalers, which would have the immediate effect of increasing cost, resulting from seriously limited volume production; that if the provision remained in the bill, it would mean the increased centralization of manufacturers in the more thickly populated industrial centers; that it would mean the further submergence of small industry and the small business man, which would actually tend to enhance monopoly in all branches of industry. The recognition that this definition of price was an anti-basing price provision, and that as such it should be eliminated from the bill is clear from the recommendations of other members of Congress. (App. 34, 35.) Nothing appears in the congressional debates nor in the reports of committees to the contrary.

When the bill was before the Senate, the debate clearly disclosed the same intent by that body. Senator Borah stated that it was his opinion that the bill would not have any effect upon the status of the basing point pricing system then used by steel, cement and other natural resource industry. (App. 35.)

It is clear that the members of Congress were aware of the fact that there was then under consideration a bill which concerned the basing point pricing system only.

(App. 32.) This bill was the Wheeler Anti-Basing Point Bill and was rejected by Congress. (80 Cong. Rec. 8102, 8223, 8224.)

By adopting the premise that the basing point pricing system is unlawful, petitioner seeks to accomplish the very thing that Congress refused to do.

The determination of the legislative intent and the application of the statute to the submitted facts are two distinct processes and the statute cannot be applied until the legislative intent has been ascertained. The decision in this case necessarily depends upon the intent of Congress.

In *Rector, etc. of Holy Trinity Church* v. *U. S.*, 143 U. S. 457, the Court said at page 459:

> "It is a familiar rule that a thing may be within the letter of the Statute and yet not within the Statute because not within its spirit nor in the intention of its makers." See also *Takao Ozawa* v. *U. S.*, 260 U. S. 178, 194.

In the recent case of *U. S.* v. *Johnson*, decided December 18, 1944, 65 S. Ct. 249, a somewhat similar question arose with reference to the construction of the Federal Denture Act. This Court held that the absence of a specific venue provision would in itself be significant, and that its significance is enhanced when it appears that the attention of Congress was directed by the Postmaster General to the desirability of authority for a discretionary trial either at the place of shipment or place of receipt. The Court stated at page 251,

> "In view of the keen awareness of enforcing officials as well as that of the members of the Committee on Interstate Commerce of the problems raised by venue in criminal trials, it is inadmissible to suggest either oversight on the part of Congress in failing to make provision for choice of venue or to make the cavalier assumption that that which is specifically provided for

> in other enactments * * * was authorized but through parsimony of language left unexpressed in the Federal Denture Act." See also *U. S.* v. *Delaware & Hudson Co.*, 213 U. S. 366, 414.

It is apparent from the legislative history of the act that Congress appraised the basing point pricing system. In spite of repeated attempts to make the basing point pricing system unlawful, Congress refused to take such action. It is not within the province of this Court to appraise the system and were the Court so inclined, it is not in a position to do so upon the record in this case. The basing point pricing system is a method of doing business that has grown up through custom and usage during a long period of time and is extensively followed. It is thoroughly embedded in the economic life of the country. If it is now desirable to change such a fundamental business practice, it is the duty of Congress to say so in clear unequivocal language which leaves no doubt as to the intention and purpose of Congress.

D. Meeting competition.

Respondents' prices were "in good faith to meet an equally low price of a competitor," under section 2(b) of the Act.

One of the defenses relied upon by respondents is provided and defined by 2(b) of the Act. (15 U. S. C. 13 (b)), which is as follows:

> "Provided, however, that nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The modified findings of fact conclude that respondents' discriminations in prices pursuant to the use of the basing

point pricing system have not been shown to be lower prices made in good faith to meet an equally low price of a competitor within the meaning of the Act. (R. 58.) This conclusion of petitioner is based upon two false premises. The first is the contention of petitioner that for true competition to exist, respondents and their competitors should sell in any given market at different prices, depending upon freight rates applicable to shipments from the respective plants. Petitioner ignores the stipulated evidence that the the quality of corn syrup is substantially the same and that no manufacturer of corn syrup is able to obtain a premium for its product. (R. 19.) Corn syrup is a standardized product. In this respect, it is in the same category with cement.

In *Cement Manufacturers Protective Association, et al. v. U. S.*, 268 U. S. 588, this Court said at page 605:

> "It is conceded that there is a substantial uniformity of price of cement. Variations of price by one manufacturer are usually promptly followed by like variation throughout the trade."

And at pages 605 and 606, the Court said:

> "A great volume of testimony was also given by distinguished economists in support of the thesis that in the case of a standardized product sold wholesale to fully informed professional buyers as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition, and the government in its brief concedes that "Undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers."

Under whatever pricing method respondents might have sold their corn syrup, their delivered prices in any market were necessarily the same as the delivered prices of their competitors. This was the result of competition and not the absence of it. Upon the dates of any of the sales stipulated

in the evidence, respondents' price for corn syrup in Decatur was higher than the delivered price quoted by competitors in Chicago. If respondents were to add freight from Decatur to Chicago to their already higher Decatur price, they obviously would have made no sales in Chicago. The Chicago corn syrup manufacturers would have had a monopoly and respondents' sales would have been restricted to a small area in central Illinois. The inference from petitioner's findings (R. 58) is that the Federal Trade Commission desires to bring about such a situation. However, if respondents were to continue in business, the only course open to them was to fix their price on the lower basis to meet the price of their Chicago competitors and to do the same in other markets. Petitioner concedes that it was necessary for respondents to meet the Chicago prices of their Chicago competitors. (Pet. for Writ of Certiorari, p. 10.)

The second false premise upon which petitioner has proceeded is that respondents' Decatur price should be the same as their Chicago delivered price. It is only by adopting this false premise that petitioner is able to make the statement that "Respondents were discriminating in order to meet (or match) the equally high delivered prices that were calculated on a Chicago basis and were discriminating by the precise amount necessary to meet (or match) such prices. (Pet. Br., p. 19.) Petitioner would ignore all differences in manufacturing costs resulting from geographical location, labor, storage facilities, shipping facilities, availability of raw materials and other numerous factors, and require respondents to establish their mill price in Decatur at the same price as the mill price of Chicago competitors. Petitioner assumes equal production costs (Pet. for Writ of Certiorari, p. 11), but there is no evidence in the record to justify such an assumption. The fallacy

of this position seems obvious, yet that is the very foundation of petitioner's case and that was the basis of the opinions of Judge Minton and Judge Evans in the lower court when they held that respondents' delivered prices were discriminatory.

When respondents were established in the manufacture and sale of corn syrup, their price in Decatur was that which resulted from adding to the mill price of their Chicago competitors the freight from Chicago to Decatur. Respondents had the right to sell in Decatur at the price their Chicago competitors were quoting for similar corn syrup delivered in Decatur. Respondents' customers could not thereby be injured. They simply paid the same price they paid before respondents entered the business. If respondents tried to charge a higher price, the business would all go to respondents' Chicago competitors at their lower price, and respondents would have to lower their price to meet the competition of the Chicago manufacturers. If respondents tried to charge a lower price, their Chicago competitors would have to meet respondents' lower price in order to get any share of the business, with the net result that respondents would simply be doing business in Decatur at a lower profit.

Having established their Decatur price for corn syrup, respondents found that if they added to their Decatur price, freight from Decatur to destination, their price in every market was higher than the prices of their competitors. This is clearly demonstrated by the following table:

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Transaction	Date	Location of Purchaser	Decatur Price[1]	Freight Decatur to Destination[2]	Decatur Price Plus Frt.	Competitive Delivered Price[2]	Difference
1.	3/30/37	St. Louis, Mo.	$3.20	0.10	3.30	3.20	-0.10
2.	10/26/38	St. Louis, Mo.	2.27	0.11	2.38	2.15	-0.23
3.	9/29/39	St. Louis, Mo.	2.27	0.11	2.38	2.16	-0.22
4.	6/2/37	Davenport, Ia.	3.20	0.134	3.334	3.20	-0.134
5.	9/26/39	Davenport, Ia.	2.27	0.14	2.41	2.27	-0.14
6.	7/17/36	Ottumwa, Ia.	2.61	0.27	2.88	2.73	-0.15
7.	12/8/38	Ottumwa, Ia.	2.27	0.27	2.54	2.39	-0.15
8.	9/28/39	Ottumwa, Ia.	2.27	0.27	2.54	2.39	-0.15
9.	5/11/37	Sioux City, Ia.	3.20	0.36	3.56	3.50	-0.06
10.	11/27/36	St. Joseph, Mo.	3.21	0.35	3.56	3.42	-0.14
11.	4/30/37	St. Joseph, Mo.	3.20	0.35	3.55	3.40	-0.15
12.	9/27/39	St. Joseph, Mo.	2.27	0.36	2.63	2.49	-0.14
13.	6/5/37	Kansas City, Mo.	3.20	0.355	3.535	3.50	-0.035
14.	11/14/38	Kansas City, Mo.	2.27	0.36	2.63	2.49	-0.14
15.	9/6/39	Kansas City, Mo.	2.27	0.36	2.63	2.49	-0.14
16.	11/28/36	Little Rock, Ark.	3.20	0.535	3.735	3.63	-0.105
17.	9/22/37	Little Rock, Ark.	3.20	0.50	3.70	3.59	-0.11
18.	4/6/37	Shreveport, La.	3.20	0.61	3.81	3.69	-0.12
19.	9/26/38	Shreveport, La.	3.32	0.67	2.99	2.74	-0.25
20.	4/15/39	Shreveport, La.	2.37	0.67	3.04	2.80	-0.24
21.	5/7/37	Dallas, Texas	3.20	0.73	3.93	3.77	-0.16
22.	5/17/37	Dallas, Texas	3.20	0.68	3.88	3.77	-0.11
23.	8/30/39	Dallas, Texas	2.27	0.75	3.02	2.89	-0.13
24.	9/16/39	Dallas, Texas	2.27	0.75	3.02	2.89	-0.13
25.	11/1/39	Dallas, Texas	2.32	0.75	3.07	2.94	-0.14
26.	3/4/38	Farmersville, Tex.	2.41	0.72	3.13	3.01	-0.12
27.	4/17/39	Farmersville, Tex.	2.37	0.72	3.09	2.96	-0.13

1. Taken from Commission's Exhibit 1. (R. 24.)
2. Taken from Respondent's Exhibits 1-A and 1-B. (R. 25, 26.)
3. Taken from Commission's Exhibit 2. (R. 24.)

We use the last transaction in the table as an example. This discloses a sale to a Farmersville, Texas customer at $2.96 per hundredweight. (Col. 7.) At the time this sale was made, the actual Decatur price was $2.37. (Col. 4.) Obviously had respondents added the freight charges from Decatur to Farmersville, Texas in the amount of $0.72 (Col. 5), the price to their Farmersville, Texas customer would have been $3.09. (Col. 6.) However, because respondents had to meet the price of competitors who were selling in Farmersville, Texas at $2.96, they had to reduce their price accordingly. Their delivered price was, therefore, $0.13

less than their price would have been had they sold on the basis of their Decatur price plus freight to destinations. (Col. 8.)

This table demonstrates the fact that an f.o.b. pricing system would have meant that respondents' prices to customers at the destinations selected by petitioner would have been from $0.10 to $0.25 per hundredweight higher than were the actual prices at which the sales were made. Had respondents attempted to maintain such prices, the buyers would have made their purchases from respondents' competitors and respondents would have lost all of such business.

The evidence is uncontradicted that respondents were unable to obtain a premium for their corn syrup. (R. 19.) In order to continue in business, it was necessary for respondents to sell at the same delivered price as their competitors, whatever that might be. (R. 18.) Thereupon, respondents fixed their prices on the lower basis "in good faith to meet the equally lower price of a competitor."

Petitioner relies upon the stipulation that on several occasions since June 19, 1936, respondents increased and reduced their prices in all markets by the same amount per hundredweight without and independent of any similar or prior action by competitors. We submit that the fact that respondents did increase their price independent of action by competitors does not mean, *ipso facto*, respondents have been guilty of price discriminations in violation of the Act. The explanation is obvious. Corn syrup is a standard product for which one manufacturer cannot charge a higher price than other manufacturers selling in the same market. It was only common business sense for respondents to know that when they announced a price change in one market, respondents' competitors,

in order to share in the business in that market, would immediately meet that price change and that such competitors would make corresponding price changes in other markets which respondents would have to meet. Rather than make these price changes piecemeal, respondents chose to make all at one time the price changes which they knew would be inevitable in any event.

For instance, had respondents reduced their price on corn syrup in markets outside of Chicago and had not made a corresponding reduction in Chicago, the Chicago competitors of respondents would have immediately made a price reduction in such market and likewise would have immediately and necessarily extended the price reduction to their customers in Chicago. As soon as the Chicago competitors of respondents reduced their prices in Chicago, respondents would likewise have been forced to reduce their Chicago price in order to meet this competitive condition. To have delayed in announcing their price reduction in Chicago would have afforded respondents' competitors the opportunity to reach some customers first with the price reduction, or had respondents refrained from making the price reduction in Chicago, they would have certainly lost their Chicago customers to competitors.

A similar situation would have developed in case of a price advance. Respondents would have been powerless to confine the advance to Chicago or to any other market or markets. If respondents' Chicago competitors elected to follow the advance in Chicago, they would have to extend the advance to markets outside of Chicago to avoid discrimination between their customers. If competitors failed to follow respondents' price advance, respondents would have been forced to cancel the price advance. To have done otherwise would have resulted in respondents' competitors getting the business from respondents' customers.

Judge Minton recognized this situation in his opinion when he said: "* * * Section 2(b) of the Statute does not require that competitors' prices shall be first announced and promulgated before one may in good faith meet them. The company may very well have known what the competitive situation in their industry was and what was certain to happen. In anticipation of what their competitors were certain to do, the company promulgated prices to meet the foreseen competitive situation." (R. 73.)

II.

Booking Practices.

Paragraph 4 of the modified findings as to the facts (R. 53, 54) is the basis for paragraph 2 of the order. (R. 36.) The practices there described are called "booking practices" and petitioner contends that these booking practices amounted to discriminations by respondents and that they were cumulative to the differentials arising from the use of the basing point pricing system. (R. 53.) These conclusions are not based upon the evidence. There is no evidence of any specific customers or any specific markets in which the booking practices took place. Obviously, it is just as logical and valid an assumption to assume that the price advantages resulting from the booking practices offset the price advantages resulting from the use of the basing point pricing system as would be the opposite assumption. Certainly if the booking practices resulted in an advantage to buyers in markets outside of Chicago, any advantage that the Chicago buyer might have obtained because of the basing point pricing system would have been minimized, eliminated entirely, or perhaps turned into an advantage in the opposite direction.

In its modified findings of fact, petitioner referred to

that part of the stipulation which had reference to the industry practices (R. 20, 21) and not to that part of the stipulation describing the part respondents took in such practices. (R. 21-23.) Respondents did not originate or adopt these abuses but simply met the competition of others where necessary to retain their customers and their business. (R. 21.)

With reference to the first practice, where a salesman or broker informed respondents that one or more of respondents' competitors had granted to one or more customers extensions of time in which to make delivery of syrup formerly booked at the older and lower price, respondents accepted the verbal statement of the buyer or buyers to respondents' salesmen or brokers, "believing such report to be true", and granted similar extensions sometimes to all buyers in all markets, and on some occasions to the particular purchasers involved. (R. 22.)

With reference to the second practice, where respondents received notice from their salesmen or brokers to enter orders for customers, they entered them and later found that some of the orders had not actually been given by the customers. (R. 22.) However, it is obvious that respondents only discovered this in the event no sales were made to those particular customers. It is also obvious that the only transactions in which there could be discriminations were those actually resulting in sales. In those cases, respondents were never informed by buyers that they had not booked the orders. Respondents suspected that some of the bookings for customers who accepted the shipments were originally made without their authority, but respondents had no way of knowing, since these customers accepted the shipments. Naturally, if there are cases in which the customer accepts shipment when his order has not actually been entered, the customer considers it to his advantage to do so, as, for instance, because of a

price increase. There is certainly no evidence that respondents made any delivery to any customer under the circumstances described in this example that were not bona fide. Even though it be assumed that some deliveries were made that were not bona fide and that such deliveries amounted to price discriminations, certainly it would be impossible to determine to what customer, or even to what markets such deliveries were made. *A fortiori* it would be impossible to determine what, if any, effect such assumed discriminations had upon competition.

The third case was where the time for accepting orders had passed and upon occasion candy manufacturers informed respondents verbally and without supporting evidence that one or more of respondents' competitors were prepared to make delivery to the candy manufacturer at the older and lower price. The candy manufacturer offered respondents the business at the lower price. The evidence is that when the customer had convinced respondents that they were meeting competition, respondents agreed to re-price the order to the lower price. (R. 21.)

The fourth case is that when tank wagon buyers were sold corn syrup at the same price as tank car buyers. Where respondents were informed by a buyer that their competitors were engaged in such transactions, respondents, "believing such reports to be true," met such competition by selling such tank wagon buyers at the same price and upon the same conditions as had been offered to the buyers by respondents' competitors. (R. 23.)

In the modified findings of fact, petitioner states its conclusion that respondents "have failed to establish affirmatively that the discriminatory price granted by them through variations of the booking practices were made in good faith to meet an equally low price of a competitor within the meaning of sub-section (b) of Section 2 of the

Statute, and therefore, so finds." (R. 61.) This conclusion is based upon the findings of fact that the respondents were not justified in accepting the unsupported verbal statement of buyers as to prices offered to such buyers by respondents' competitors. (R. 61.)

What evidence is necessary before a seller is justified in meeting the competition of competitors? The Act includes no requirement that any certain kind of evidence must be obtained. It does not require that respondents make "any effort to verify the existence of a lower price by other sellers." It does not state what facts should be obtained which would "lead a reasonable and prudent person to believe that the granting of a lower price would be meeting an equally low price of a competitor." It does not state what a seller must do to exercise "diligence to ascertain such facts." It is only common business knowledge to know that if respondents did not accept the verbal statements of their customers with reference to the price offered to customers by respondents' competitors, respondents lost such customers' business. The customers' word was the best evidence available to respondents. It seems only reasonable that in exercising "good faith" to meet the price of a competitor, a seller should be justified in relying upon the "good faith" of his customer.

The Courts will presume that a person obeys the law and acts in good faith unless the contrary is shown.

Fidelity & Deposit Co. of Maryland v. *Grand Nat'l Bank of St. Louis*, 69 Fed. (2d) 177 at page 183.

Missouri Pacific Railroad Co. v. *Prude*, 265 U. S. 99 at page 101.

Wilson v. *The City Bank of St. Paul*, 84 U. S. 723 at page 728.

Flynn & Emrich Co. v. *Federal Trade Commission*, 52 Fed. (2d) 836 at Page 838.

One of the new amendments to the Clayton Act as provided by the Robinson-Patman Act was Section 2(f), (App. 29) which makes it unlawful for a buyer to knowingly induce or receive a prohibited discrimination. We submit that respondents were entitled to presume that their customers would not violate this section of the Act, and upon such presumption, were justified in believing the statements made to them by their customers.

The Statute under which this defense was presented merely provides that nothing contained in the sections named "shall prevent a seller rebutting the prima facie case thus made", by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. This showing was made in the stipulation and it was not met or questioned by other evidence offered by petitioner. Under the Statute, the only burden respondents had was to rebutt the prima facie case made by petitioner. This, respondents did, and we submit that the findings and conclusions of petitioner are erroneous and are not supported by the evidence. As a matter of fact, in so far as the "booking practices" were concerned, petitioner did not make out a prima facie case. It made out no case of any kind. The only evidence in the record relating to "booking practices" was offered by respondents. (R. 18, 20-23.)

Conclusion.

Respondents submit that the decision of the Court below should be affirmed.

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Attorneys for Respondents.

February, 1945.

APPENDIX.

Statutes.

Section 2, Clayton Act (prior to amendment by Robinson-Patman Act):

"SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession, or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (38 Stat. 730.)

Section 2(a), Clayton Act (as amended by the Robinson-Patman Act):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale

within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent persons engaged in selling goods, wares or merchandise in commerce, from selecting their own customers in bona fide transactions, and not in restraint of trade: And provided further, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13(a).)

Section 2(b), Clayton Act (as amended by the Robinson-Patman Act):

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13 (b).)

Section 2(f), Clayton Act (as amended by the Robinson-Patman Act):

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." (38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13 (f).)

Congressional Debate.

House of Representatives.

Mr. Patman: "The House Bill as reported by the Committee under Section 5 contains a definition of price which is really an anti-basing point provision. The Judiciary Committee, however, met today and passed a resolution requesting the chairman to introduce an amendment on the floor striking this provision from the bill. This meets with my approval and I am sure will meet with the approval

of a majority of the members of the house * * *." (80 Cong. Rec. 7760.)

* * * * *

Mr. Sabath: "* * * It is true that there are objectionable features, namely, the antibasing point and the classification provision. But I want to inform the House that the Judiciary Committee has agreed to move to eliminate both of these provisions from the bill. Likewise, if it is shown that other features are objectionable, they may be modified." (80 Cong. Rec. 8102.)

* * * * *

Mr. Miller: "* * * The next amendment that will be offered by the committee as a committee amendment will be directed at subsection (5) on page 7, which is the basing point provision in the bill."

Mr. Rich: "Does the gentleman mean to strike out the whole section?"

Mr. Miller: "That amendment will be for the purpose of striking out all of subsection (5), or the basing point provision in the bill. Probably that provision should not have been put in a bill amending the Clayton Act; but it was put in and the committee has decided to offer an amendment to take it out." (80 Cong. Rec. 8106.)

* * * * *

Mr. Patman: "* * * Farmers' organizations sent letters to all the Members saying they were opposed to certain things; I learned through their representatives in Washington 2 or 3 weeks ago they were opposed to the basing-point provision of the bill, section 5. So I took it up with the Judiciary Committee. The committee members had heard similar complaints and the committee at a meeting agreed to cut out the basing-point provision. This silenced a lot of the opposition. The basing point is not directly related to what we are trying to do, as I view it, so it was all right to cut this out." (80 Cong. Rec. 8113.)

* * * * *

Mr. Boileau: "Another objection raised by these farm leaders was with respect to the anti-basing-point provision. They felt that this was a dangerous feature of the bill. I personally would rather have that anti-basing-point provision in the bill, but the committee, in its wisdom, will submit a committee amendment striking it out. The members of the steering committee believe that in order to insure its enactment we should eliminate this provision, and, although personally I would prefer that it remain in the bill, I am nevertheless willing to go along. I am pleased that in this respect we are meeting the demands of the farm organizations with whom I have always tried to cooperate, both as a member of the Committee on Agriculture and as a Member of the House, and whose views I have welcomed at all times in the consideration of this bill."

"I have given consideration to their needs as a member of the Patman committee investigating chain stores, and as a member of the executive committee of the Steering Committee organized to promote the adoption of this bill. It is now agreed that the anti-basing-point provision is to be eliminated. So far as I am concerned, I would like to see it remain in the bill, because I do not believe it to be dangerous, but in the interest of the passage of the measure, and because of the apparent apprehension of the farm leaders, I am going to vote to take it out." (80 Cong. Rec. 8122.)

Mr. Brown of Michigan: "I want to congratulate the committee for eliminating this provision from the bill at the request of many of us. If the section had remained in, it would be ruinous to small town industry located some distance from the market."

Mr. Citron: "Mr. Chairman, will the gentleman yield?"

Mr. Miller: "I yield."

Mr. Citron: "Mr. Chairman, if this provision remains in the bill, it would result in forcing f. o. b. shipping prices

on manufacturers; but with this provision eliminated they will not be forced to charge f. o. b. shipping point prices. Otherwise, many would not be able to compete with foreign manufacturers, for instance, from Canada, who would not be subject to this provision if it remained in the bill."

"As a member of the Judiciary Committee I voted to eliminate this paragraph, no. 5. I advocated the elimination of this paragraph in the committee, because I considered it would result in a hardship to the manufacturing industry of this country and of my own State."

"This paragraph in this bill that we are eliminating is as follows:

> (5) That the word "price" as used in section 2 shall be construed to mean the amount received by the vendor after deducting freight or other transportation, if any, allowed or defrayed by the vendor.

Reasons Against Limiting Manufacturers To F. O. B. Shipping Point Price in Amending Our Antitrust Laws.

"I believe that there are very important reasons why this paragraph should be eliminated entirely, not only for the reason that there is already under consideration a bill which has separately and wholly to do with the basing-point price method, and on which committee hearings have been held, but also for the reason that the basing-point price method has some economically sound merits, and to prohibit the legitimate carrying on of this pricing system by industries will have serious consequences in many industries doing business within the confines of the United States. There is still a further most important reason why this particular definition of price should be eliminated from the instant bill, which is that it would compel all manufacturers and wholesalers under the jurisdiction of the United States Government to ship all their merchandise on an f. o. b. point of origin basis and the consequences of such a statute would be to place many of our manufacturers and wholesalers at a serious disadvantage when competing with foreign manufacturers and exporters who do business in the United States."

"But a more serious consequence of the inclusion of this definition of price, as previously stated, would be to compel all manufacturers to ship f. o. b. shipping point, and therefore compel the very definite localization of operations of all manufacturers and wholesalers, which would have the immediate effect of increasing costs as the result of seriously limited volume production."

Volume Production.

"Volume production is the very lifeblood of many types of industries. If the products they manufacture cannot be made in large volume, upon which the low cost is dependent, the cost of the finished product would be so high that it would seriously curtail, if not entirely prohibit, their consumption."

"This paragraph would seriously affect the publishers of national magazines, because it may mean that the national publishers cannot sell their magazines not only for the reason that the freight charges on the magazines to distant points will be so great as to prohibit the sale of the magazines at those points, but also for the reason that the magazines are dependent upon advertising revenues derived from national distributors whose operations will be seriously curtailed by this definition of price."

"If this paragraph remains in this bill, it will mean the increased centralization of manufacturing in the more thickly populated industrial centers."

"Some people say these consequences can easily be offset by manufacturers and wholesalers establishing wholesale-distributing points all over the United States. However, this would mean increasing the number of operations and the amount of handling, all of which entails increased cost which the consumer must pay, and only the larger manufacturers in the country would finance the cost, and it would mean the further submergence of the small industry and the small-business man, which would actually tend to enhance monopoly in all branches of industry."

I advocate Protection For Connecticut Industry Against Any Unfair Foreign Competition

"Another very serious objection to this paragraph is that in many instances our manufacturers and wholesalers would be placed at a serious disadvantage in meeting competition of manufacturers in other countries. Take an instance from my own State—the Scovill Manufacturing Co., a large and old established concern which manufacture thousands of different kinds of metal products, from articles for personal use—such as buttons—to parts to be used in the manufacture of other merchandise. Under the terms of this definition of price in the instant bill, they would be compelled to charge freight from Connecticut to New York City, to Baltimore, to New Orleans, to San Francisco, to Detroit, or to Chicago, just to mention a few major manufacturing centers. A manufacturer in the same kind of business, located in Canada or in Europe, or any other industrial country, and who is not subject to the jurisdiction of our Federal statutes, would be able to deliver his products f. o. b. to every one of these industrial cities which I have mentioned for the reason that they are all direct ports of entry into the United States. By the wording of this definition of price in this paragraph, the Scovill Manufacturing Co. could not meet the foreign competition, nor could any other manufacturer in the United States, under like conditions, meet that competition. The only way open to them would be to set up manufacturing branches in Canada, which would have the effect of further increasing unemployment in the United States."

"Because of the reasons that I have given, I also favor the exclusion of this paragraph."

Mr. Miller: "I think the amendment ought to be adopted. I doubt whether that provision ought ever to be in this kind of bill anyway." (80 Cong. Rec. 8223, 8224.)

* * * * * *

Mr. Robinson: "* * * There were two features, however, on which we were not in full agreement. Many of us opposed section 5, on page 7, of this bill. It is the so-called price-fixing or basing-profit provision. It has been

unanimously agreed that that section go out; * * *." (80 Cong. Rec. 8130.)

Mr. Miller: "* * * The second amendment which the Committee on the Judiciary will offer is to lines 20 and 23 on page 7 of the committee amendment to the bill, and the amendment will be a motion to strike said lines 20 to 23, both inclusive, therefrom.

"This particular section which the committee will seek to strike out is designated as subsection (5) on page 7, and is what is commonly called the basing-point provision." (80 Cong. Rec. 8139, 8140.)

Mr. Utterback: "* * * But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill". (80 Cong. Rec. 9116.)

Senate.

Mr. Davis: "Mr. President, if I may have the attention of the Senator from Idaho, I should like to ask him whether this proposed legislation changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries.

Mr. Borah: "I could not answer offhand, because I am not sure that I know the exact operation of the basing-point plan in the steel industry."

Mr. Davis: "Under the basing-point plan in the steel industry the markets all over the country are available for anyone who is engaged in that industry."

Mr. Borah: "My opinion would be that this does not have any effect upon that. I defer to the judgment of the Senator in charge of the bill, but that would be my impression."

Mr. Van Nuys: "The Senator from Idaho is correct." (80 Cong. Rec. 10018.)

Werne, "Business and the Robinson-Patman Law."

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"The report of the Federal Trade Commission to the President on Steel Sheet Piling,[1] the Wheeler Anti-Basing Point Bill,[2] and the Government's attitude toward uniform prices[3] again focus the attention of businessmen on the legality, as well as the commercial value, of basing point or freight zoning systems. There has been a pronounced trend in recent years for sellers to meet competition by adopting various more or less mechanical methods of dealing with freight costs in arriving at a final sale price.[4] Thus, in an increasing number of industries the practice of employing 'basing-point', 'multiple basing-point', and 'delivered price' systems has become customery.[5]

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The single basing-point system was one of the earliest methods of arriving at an artificial equalization of freight charges. The need for added basing points due to competition from factories in new localities has led to the so-called multiple basing-point system, wherein prices are determined as of the basing point nearest to the purchaser. Other systems are to sell on a flat delivered price for a

1. Fed. Trade Comm., Report on Steel Sheet Piling, 1936.

2. See Hearings before Senate Committee on Interstate Commerce on S. 4055; 74th Cong., 2d Sess.

3. Id. at 286-288; see Editorial, N. Y. J. Comm., June 23, 1936, p. 2, col. 1.

4. Fed. Trade Com., supra note 1, at 37-39.

5. The following industries use a zone price system: iron and steel, tobacco products, thread, stoves, mahogany, asphalt, mastic tiles, salt, bathtub, alcohol, coffee, soap, corn products, linseed products, cereal products, newsprint, paper, gasoline and oil products, wire and cable, valve and fittings.

The following industries use basing-point systems (or modifications thereof): lumber, steel and iron, cement, zinc, corn products, copper, fertilizer, gasoline, lead, sugar, laundry machinery, crane and shovels, flour, range boilers, bolts, nuts and rivets, cast iron pipe, asphalt roofing, linseed oil. It should be noted that some materials are sold part on one and part on the other system. Generally speaking, the industries using such freight systems are those which have standardized products, or products which conventionally are of uniform grade and quality.

given area or for the entire country, or to divide the country into freight zones and sell products at a uniform
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delivered price for each zone. All of these systems have much the same purpose and in general operate with similar effect, although the economic situation in some industries seemed to make one system more adaptable than another.

Any discussion of the law of such freight systems requires a clear understanding of the economic background of the various practices.[18] The Supreme Court has repeatedly pointed out the necessity of clearly understanding the factual background in each anti-trust case.[19] For that reason the facts which are typical of a number of manufacturing industries will be set forth briefly.

The manufacturers in these industries, which in the main had grown up along the Atlantic seaboard, originally sold their products f.o.b. factory, charging the actual freight to the destination if a delivered price were desired. By the early years of the twentieth century some companies had varied this method of arriving at a sale price, so that some large producers sold at a uniform delivered price in each state, while others sold on actual freight east of the Mississippi River and had adopted a modified basing-point system west of the Mississippi. During the World War the War Industries Board adopted a plan in placing orders for cantonment camps in order to insure an adequate supply of equipment. After the War and the depression of 1920, the practices of these industries were rapidly becoming more uniform in sales of competing products. Products which were smaller in size and weight, since they were not subject to such noticeable price variations

18. For a good discussion of the general economic background of such freight systems see Burns, The Decline of Competition (1936), 280-371.

19. *Appalachian Coals v. United States*, 288 U. S. 344, 360-361, 53 Sup. Ct. 471 (1933); *Sugar Institute v. United States*, 297 U. S. 553, 56 Sup. Ct. 629 (1936).

when the actual freight was charged, generally used a close approximation to the actual freight rates from the point of production to those of consumption. The larger and heavier products, for which price variations due to

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freight costs were substantial, came to be sold by most producers on a basing-point or a freight-zone system.

The N. R. A. took no stand on the question of geographical discrimination in price.[20] As a result, a number of the codes provided for freight-zone, basing-point, or delivered systems.[21] In industries such as lumber, cement and insulated cable, where these practices had become an industry custom or practice before the codes, they were continued under them, and the practices became more standardized due to the existence of open price filing provisions in the codes. All of the N. R. A. codes had a pronounced effect upon their respective industries in crystallizing and unifying industry practices, especially if they provided for open price filing.[22] The termination of the N. R. A. era, therefore, generally left industry practices stabilized.

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20. But see Richberg's remarks in Hearings before Senate Committee on Interstate Commerce, supra note 2, at 85-86: "It was our observation, and it was the opinion of the experts outside whose aid we obtained, that a basing-point system in which every producing area was a basing point would be a sound and economical system and good business practice. In other words, if there were a lot of mills within a small radius of 25 to 50 miles of Pittsburgh, as a business practice there was nothing wrong, and a great deal of convenience and benefit in having one basing-point for that area. The evil in the basing-point system that seemed to me evident from the beginning, and which I think is partly historical growth and partly the result of the power of certain large interests in the industry, has been the denial of basing-points to certain producing areas that ought to have basing-points, and, as a result, the establishment of artificial basing-points in nonproducing areas, giving a special advantage to the producing areas which did have basing-points."

21. Six codes provided for freight systems. They were: Fertilizer, Petroleum, Business Furniture, Storage and Filing Equipment, Salt, and Shovel Dragline and Crane. Five codes provided for basing-points. They were: Cast Iron Pipes, Iron and Steel, Lime, Refractories, and Reinforcing Materials. Thirty-three other codes provided for delivered prices of some kind. For further material see Consumer Advisory Board, Appendices to Memorandum to General Johnson, Feb. 19, 1934.

22. Fed. Trade Comm., supra note 1, at 6.

The fact that most of the factories in many industries were located in New York, New Jersey, Pennsylvania and Connecticut seemed to aid those industries in arriving at freight systems. The freight zones, then, which these industries use, represented places which would have had approximately equal freight rates for goods shipped from New York City, and the freight-zone charges were approximations of actual freight costs. As factories were built in other sections of the country, freight-zone charges bore less relation to the actual costs of transportation.

When basing-point or freight-zone systems are employed, prices are generally quoted on a delivered-price basis. As a result, customers are not aware of how much of the final price is in fact a charge for freight.[23] Under these systems each manufacturer defrays at times a part of the actual transportation costs; at other times he may receive more than the actual freight costs if he is located near the consumer, and he charges the railroad freight from some recognized center of production or an average zone freight rate.

23. Hearings before Senate Committee on Interstate Commerce, supra note 2, at 322.

SUPREME COURT OF THE UNITED STATES.

No. 559.—October Term, 1944.

Federal Trade Commission, Petitioner, *vs.* A. E. Staley Manufacturing Company and Staley Sales Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 23, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Respondents, a parent company and its sales subsidiary, are engaged in the manufacture and sale of glucose or corn syrup in competition with others, including the Corn Products Refining Company, whose methods of marketing and pricing its products are described in our opinion in *Corn Products Refining Company* v. *Federal Trade Commission*, No. 680, decided this day. Respondents, in selling their glucose, have adopted a basing point delivered price system comparable to that of the Corn Products Refining Company. Respondents sell their product, manufactured at Decatur, Illinois, at delivered prices based on Chicago, Illinois, the price in each case being the Chicago price plus freight from Chicago to point of delivery.

In this proceeding, brought under § 11 of the Clayton Act, c. 323, 38 Stat. 730, 15 U. S. C. § 21, the Federal Trade Commission charged that respondents' pricing system resulted in price discriminations between different purchasers of glucose in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, c. 592, 49 Stat. 1526, 15 U. S. C. § 13. The case was heard by the Commission on stipulations of facts and exhibits, upon the basis of which the Commission ultimately made its findings. Applying the same principles as in the *Corn Products Refining Company* case, it concluded that respondents had made discriminations between different purchasers in the price of their product; and that respondents were unable to justify the discriminations, as permitted by § 2(b) of the Clayton Act, by showing that they were

made "in good faith" to meet a competitor's equally low price. The Commission accordingly made its order directing respondents to cease and desist from the price discriminations.

On review of the Commission's order, the Court of Appeals for the Seventh Circuit set the Commission's order aside, one judge dissenting. 144 F. 2d 221. One of the majority judges did not consider whether the price discriminations violated § 2(a), but held that in any event they were made in good faith to meet their competitors' price within the meaning of § 2(b). Another concurred in the result on the ground that the Commission had failed to make out a case of unlawful price discrimination, and for that reason he found no occasion to pass upon the merits of respondents' defense. The third judge dissented on the ground that respondents' discriminations were unlawful and not justified by competition. We granted certiorari. 323 U. S. —.

The principal question for decision is whether respondents, who adopted the discriminatory price system of their competitors, including the Corn Products Refining Company, have sustained the burden of justifying their price system under § 2(b) of the Clayton Act, as amended, by showing that their prices were made "in good faith" to meet the equally low prices of competitors. A further question is whether there was evidence to support the Federal Trade Commission's findings that respondents, in granting to certain favored buyers, discriminatory prices for their product, did not act "in good faith" to meet a competitor's equally low price within the meaning of § 2(b) of the Clayton Act.

The Commission found that at all relevant times respondents have sold glucose, shipped to purchasers from their plant at Decatur, Illinois, on a delivered price basis, the lowest price quoted being for delivery to Chicago purchasers. Respondents' Chicago price is not only a delivered price at that place. It is also a basing point price upon which all other delivered prices, including the price at Decatur, are computed by adding to the base price, freight from Chicago to the point of delivery. The Decatur price, as well as the delivered price at all points at which the freight from Decatur is less than the freight from Chicago, includes an item of unearned or "phantom" freight, ranging in amount in instances mentioned by the Commission, from 1 cent per hundred pounds at St. Joseph, Missouri, to 18 cents at Decatur. The Chicago price, as well as that at points at which the freight from Decatur exceeds

freight from Chicago required respondents to "absorb" freight, varying in instances cited by the Commission from 4 cents per one hundred pounds at St. Louis, Missouri, to 15½ cents per hundred pounds at Chicago.

The Commission found that this inclusion of unearned freight or absorption of freight in calculating the delivered prices operated to discriminate against purchasers at all points where the freight rate from Decatur was less than that from Chicago and in favor of purchasers at points where the freight rate from Decatur was greater than that from Chicago. It also made findings comparable to those made in the *Corn Products Refining Company* case that the effect of these discriminations between purchasers, who are candy and syrup manufacturers competing with each other, was to diminish competition between them.

The Commission also found that respondents, during a period of from five to ten days after they advance the prices of their product, customarily permit purchasers generally to "book" orders or secure options to purchase glucose at the old price, for delivery within thirty days, but that they also have permitted certain favored purchasers to secure additional extensions of time for delivery upon such options. In consequence of these time extensions, the favored buyers were enabled to secure glucose at a lower price than that concurrently being charged to other buyers. In some instances, after a price advance, respondents also made fictitious bookings on which deliveries were later made, at the option of the favored buyers; and in still other cases sales were made to favored purchasers long after the expiration of the booking period. Respondents also book glucose in tank car lots to certain purchasers who lack storage facilities for such quantities; respondents then actually make deliveries in tank wagon lots over a period of many months, during which they are selling to others upon like deliveries at higher prices.

These findings and the conclusion of the Commission that the price discriminations involved are prohibited by § 2(a), are challenged here. But for the reasons we have given in our opinion in the *Corn Products Refining Company* case the challenge must fail. The sole question we find it necessary to discuss here is whether respondents have succeeded in justifying the discriminations by an adequate showing that the discriminations were made "in good faith" to meet equally low prices of competitors.

I.

We consider first, respondents' asserted justification of the discriminations involved in its basing point pricing system. As we hold in the *Corn Products Refining Company* case with respect to a like system, price discriminations are necessarily involved where the price basing point is distant from the point of production. This is because, as in respondents' case, the delivered prices upon shipments from Decatur usually include an item of unearned or phantom freight or require the absorption of freight with the consequent variations in the seller's net factory prices. Since such freight differentials bear no relation to the actual cost of delivery, they are systematic discriminations prohibited by § 2(a), whenever they have the defined effect upon competition.

Respondents sought to justify these discriminations before the Commission, by a stipulation detailing the history and use of their present pricing system. From this it appears that in 1920, when respondents began the manufacture of glucose or corn syrup, they found that syrup manufactured by their competitors "was being sold at delivered prices in the various markets of the United States;" that in Chicago two large factories were manufacturing syrup and delivering it in Chicago at prices lower than prices then prevailing in any other market; and that the delivered price in such other markets was generally equal to the Chicago price plus the published freight rate from Chicago to the point of delivery. Respondents thus found in operation a pricing system which, if followed, would produce exact identity in prices of glucose of the several producers when sold in any city of the United States. Respondents, to gain access to the markets thus established, made their sales "by first quoting the same price as were quoted by competitors and then making whatever reduction in price . . . was necessary to obtain business." When respondents soon found that their product would command the same market price as that of their competitors, they "adopted the practice of selling at the same delivered prices as [their] competitors, whatever they might be." Respondents have followed the same practice since June 19, 1936, the date of enactment of the Robinson-Patman Act.

Section 2(b) of the Clayton Act provides:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . , the burden of rebutting the prima-facie case

thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

It will be noted that the defense that the price discriminations were made in order to meet competition, is under the statute a matter of "rebutting" the Commission's "prima-facie case." Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it "shall prevent" discriminations in price "made in good faith to meet competition." The change in language of this exception[1] was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6-7; see also the statement of Representative Utterbach, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418.

But respondents argue that they have sustained their burden of proof, as prescribed by § 2(b), by showing that they have adopted and followed the basing point system of their competitors. In the *Corn Products Refining Company* case we hold that this price system of respondents' competitor in part involves unlawful price discriminations, to the extent that freight differentials enter into the computation of price, as a result of the selection as a basing point of a place distant from the point of production and shipment. Thus it is the contention that a seller may justify a basing-point delivered price system, which is otherwise outlawed by § 2, because other competitors are in part violating the law by

[1] As originally introduced, the Robinson-Patman amendment contained no provision similar to that in § 2 of the Clayton Act as originally enacted, which provided "That nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition." In the Senate this existing provision was added by amendment to the Robinson-Patman bill. 80 Cong. Rec. 6426, 6435. In the House, the Judiciary Committee reported the bill with the proviso, substantially as enacted in § 2(b). 80 Cong. Rec. 8139. The Conference Committee rejected the Senate version and approved the House amendment. The Report of the Conference Committee, speaking of the Senate proviso, said: "This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. . . . A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission, is included in subsection (b). . . ." H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6-7.

maintaining a like system. If respondents' argument is sound, it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.

This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. But § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. Respondents are here seeking to justify delivered prices which discriminate in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, by a pricing system involving phantom freight and freight absorption. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by § 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another.[2]

The statutory test is whether respondents, by their basing point system, adopted a "lower price . . . in good faith to meet an equally low price of a competitor." This test presupposes that the person charged with violating the Act would, by his normal non-discriminatory pricing methods, have reached a price so high, that he could reduce it in order to meet the competitor's equally low price. On the contrary, respondents have used their pricing system to adopt the delivery prices of their Chicago competitors, by charging their own customers upon shipments from Decatur the Chicago base price plus their competitors' costs of delivery from Chicago. Even though respondents, at many delivery points, enjoyed freight advantages over their competitors, they did not avail of the opportunity to charge lower delivered prices. In

[2] The Chairman of the House Conferees, in presenting the Conference Report, emphasized with illustrations, that "this procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violations of the obvious intent of the bill." See 80 Cong. Rec. 9418.

stead they maintained their own prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, by including phantom freight in their own delivered prices.

Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations, by charging their customers upon shipments from Decatur, the Chicago base price plus their competitors' actual costs of delivery from Chicago. Moreover, there is no showing that if respondents had charged non-discriminatory prices, they would be higher in all cases than those now prevailing under their basing point system. Hence it cannot be said that respondents' price discriminations have resulted in "lower" prices to meet equally low prices of a competitor.

Respondents make an ingenious argument that they could have used their present price for deliveries at Decatur (which is the Chicago base price plus freight from Chicago to Decatur) as their base price; and that with the addition of freight from Decatur to the points of delivery, the delivered prices would in all cases then be higher than the present prices, so that reduction to meet the lower prices of their competitors would be permissible under § 2(b). But this is no answer to the ruling of the Commission that the competitive situation did not justify respondents' pricing system, since respondents' argument is based upon a hypothesis, which never in fact existed. The fact that respondents' prices are lower than those they might have charged, but never did charge, does not tend to show the establishment of a lower price to meet an equally low price of a competitor.

Further, we cannot say that respondents' discriminations in price were shown to have been made in a "good faith" effort to meet competition, as § 2(b) requires. As we have pointed out here and in our opinion in the companion case, *Corn Products Refining Company* v. *Federal Trade Commission*, *supra*, the basing point system used by respondents discriminates systematically in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, and against purchasers at Decatur and points nearer to it, by reason of respondents' absorption of freight and collection of phantom freight.

This is illustrated most graphically by respondents' delivered prices at Decatur and Chicago. On August 1, 1939, these were $2.09 at Chicago, and $2.27 at Decatur. Since respondents incurred 18 cents freight in shipping to Chicago, their net price at the Decatur factory on shipments to Chicago, was $1.91. The discrimination in favor of Chicago and against Decatur was thus 36 cents, or 17 per cent of the Chicago price, in a field where a difference of a fraction of a cent in the sales price of the candy processed from the glucose could divert buyers from one candy manufacturer to another. Only to a lesser degree are there like discriminations when other points of delivery are compared.

The Commission's conclusion seems inescapable that respondents' discriminations, such as those between purchasers in Chicago and Decatur, were established not to meet equally low Chicago prices of competitors there, but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system. The systematic adoption of a competitor's prices by including unearned freight in respondents' delivery price or, what amounts to the same thing, the maintenance of a discriminatory and artificially high f. o. b. factory price in order to take advantage of the correspondingly high prices of a competitor, based on its higher costs of delivery, is not sufficient to justify the discrimination, for respondent fails to show, as the statute requires, the establishment of a "lower price" made in good faith to meet the equally low price of a competitor. By adopting the price system of their competitors, respondents have succeeded in many instances in establishing an artificially high price and have thus secured the benefit of the high price levels of a competitor whose costs of delivery are greater.

A price discrimination is measured by the difference between the high price to one purchaser and the lower price to another. Respondent's price discriminations were not dictated by the lower delivery costs or lower delivery prices of their competitors. In none of the markets in which respondents had a freight advantage over their Chicago competitors did respondents reduce their prices below those of their competitors. Instead they met and followed their competitors' prices by prices rendered artificially high, by the inclusion of unearned freight proportioned to the amount by which their competitors' delivered costs exceeded their own.

We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least

where it has never attempted to set up a non-discriminatory system, giving to purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance. And for like reasons, we must reject respondents' argument that the Commission's order could be rendered nugatory by respondents' establishing such a high factory price as always to admit of reductions in order to meet the prices of competitors who are using a Chicago basing point system. For we think it could not be said that this practical continuation of the present discriminatory basing point system would be in good faith. But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price.

Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. In the present case, the Commission's finding that respondents' price discriminations were not made to meet a "lower" price and consequently were not in good faith, is amply supported by the record, and we think the Court of Appeals erred in setting aside this portion of the Commission's order to cease and desist.

II.

The Commission found that respondents had not sustained the burden of rebutting the prima facie case of price discriminations involved in their booking practices, since they had failed to show that their lower prices were "made in good faith to meet an equally low price of a competitor". The facts as stipulated were only that the discriminations were made in response to verbal information received from salesmen, brokers or intending purchasers, without supporting evidence, to the effect that in each case one or more competitors had granted or offered to grant like discriminations. It is stipulated that respondents, "believing such report to be true, has then granted similar" price discriminations. The record contains no statements by the persons making these reports and dis-

closes no efforts by respondents to investigate or verify them, and no evidence of respondents' knowledge of their informants' character and reliability. It is admitted that in some instances respondents made sales upon bookings which they suspected had been made without knowledge of the buyers.

In appraising the evidence, the Commission recognized that the statute does not place an impossible burden upon sellers, but it emphasized the good faith requirement of the statute, which places the burden of proving good faith on the seller, who has made the discriminatory prices. The Commission commented on the tendency of buyers to seek to secure the most advantageous terms of sales possible, and upon the entire lack of a showing of diligence on the part of respondents to verify the reports which they received, or to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor. The Commission thought that respondents' allowance of discretionary prices, in circumstances which strongly suggested that the buyers' claims were without merit, as well as respondents' readiness to grant discriminatory prices without taking any steps to verify the existence of a lower price of competitors, and the entire absence of any showing that respondents had taken any precaution to conduct their business in such manner as to prevent unwarranted discriminations in price, all taken together, required the conclusion that respondents had not sustained the burden of showing that their price discriminations were made in good faith to meet the lower prices of competitors.

Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circumstances, which are peculiarly favorable to price discrimination abuses. We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a

competitor. Nor was the Commission wrong in holding that respondents failed to meet this burden.

The appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, *supra*, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, *supra*, 73. We cannot say that the Commission's inference is not supported by the stipulated facts or that its inference does not support its order.

The Commission's order will be sustained. The judgment below will be reversed, and the cause remanded with instructions to enforce the Commission's order.

So ordered.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

Mr. Justice JACKSON concurs in the result.